Supreme Court, U.S.
FILED
DEC 20 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-878

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

PAN AMERICAN WORLD AIRWAYS, INC.; AIR LINE PILOTS ASSOCIATION, INTERNATIONAL; AIR LINE PILOTS ASSOCIATION, PAN AM CHAPTER; FLIGHT ENGINEERS INTERNATIONAL ASSOCIATION; FLIGHT ENGINEERS INTERNATIONAL ASSOCIATION, PAN AM CHAPTER,

Petitioners,

v.

JOHN C. COOK, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

---

RESPONDENTS' BRIEF IN OPPOSITION

JEFFREY C. LONDA
Counsel of Record
BUTLER & BINION
1600 Allied Bank Plaza
Houston, Texas 77002
(713) 237-3270

ROBERT E. COHN
KEVIN FLYNN
SHAW, PITTMAN, POTTS & TROWBRIDGE
1800 M Street, N.W.
Washington, D.C. 20036
(202) 822-1060

Attorneys for Respondents

JEFFERY BERNBACH
521 Fifth Avenue
New York, New York
(212) 687-9730

Of Counsel for Respondents

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

BEST AVAILABLE COPY

QUESTIONS PRESENTED FOR REVIEW

1. Is review of Petitioners' appeal of an interlocutory decision of the Second Circuit Court of Appeals a waste of this Court's resources?

2. Is the decision of the Second Circuit Court of Appeals that Respondents have alleged a "continuing violation" of the ADEA consistent with the decisions of this Court and the circuit courts, thereby presenting no new questions for this Court's review?

3. Is the decision of the Second Circuit Court of Appeals that Respondents' lawsuit is not a "collateral attack" on an order of the Civil Aeronautics Board consistent with the decisions of this Court and the circuit courts, thereby presenting no new questions for this Court's review?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED FOR REVIEW	i
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	iv
I. STATEMENT OF THE CASE	2
II. REASONS FOR DENYING THE WRIT	4
A. Petitioners are Appealing an Interlocutory Decision of the Second Circuit Court of Appeals, the Review of Which By This Court at This Time Would Be a Waste of This Court's Resources	4
B. The Decision of the Second Circuit Court of Appeals on the Issue of Whether Respondents Have Alleged a "Continuing Violation" of the ADEA is Consistent With the Decisions of This Court and the Circuit Courts and Presents No New Questions for This Court's Review	5
C. The Decision of the Second Circuit Court of Appeals on the Collateral Attack Issue is Consistent With the Decisions of This Court and the Circuit Courts and Present No New Questions for This Court's Review	13
1. The Second Circuit Court of Appeals properly followed decisions of this Court and the circuit courts entitling Respondents to a jury trial in U.S. district court on the merits of their age discrimination complaint	14
2. The decision of the Second Circuit Court of Appeals is consistent with the decisions of this Court and the circuit courts on the collateral attack issue	20
III. CONCLUSION	24

TABLE OF AUTHORITIES

Cases Page

Acha v. Beame, 570 F.2d 57 (2d Cir. 1978) 10
Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974) ..... *passim*
Aronsen v. Crown Zellerbach, 662 F.2d 584 (9th Cir. 1981) 10
Ass'n Against Discrimination in Employment, Inc. v. City of Bridgeport, 647 F.2d 256 (2d Cir. 1981), *cert. denied*, 455 U.S. 988 (1982) 6
Baldwin v. New York, 399 U.S. 66 (1970) 14
Barrentine v. Arkansas-Best Freight System, Inc., 450 U.S. 728 (1981) 13
Beins v. United States, 695 F.2d 591 (D.C. Cir. 1982) 22, 23
Bernhardt v. Polygraphic Co., 350 U.S. 198 (1956) 16
Bethel v. Jendoco, 570 F.2d 1168 (3d Cir. 1978) 10
Bronze Shields, Inc. v. N.J. Dept. of Civil Serv., 667 F.2d 1074 (3d Cir. 1981) 10, 11
Carey v. O'Donnell, 506 F.2d 107 (D.C. Cir. 1974), *cert. denied*, 419 U.S. 1110 (1975) 22, 23
Cedeck v. Hamiltonian Federal Sav. & Loan Ass'n., 551 F.2d 1136 (8th Cir. 1977) 10
Chandler v. Roudebush, 425 U.S. 843 (1976) 15, 19, 20
Chardon v. Fernandez, 456 U.S. 6 (1981) 7
City of Tacoma v. Taxpayers of Tacoma, 357 U.S. 320 (1958) 20, 21
Clark v. Olinkraft, 556 F.2d 1219 (5th Cir. 1977) 10
Cox v. United States Gypsum Co., 409 F.2d 209 (7th Cir. 1969) 10
Delaware State College v. Ricks, 449 U.S. 250 (1980) 7, 8, 11
Dickinson v. Chrysler Corp., 456 F. Supp. 43 (E.D. Mich. 1978) 15
EEOC v. Home Insurance Co., 553 F. Supp. 704 (S.D.N.Y. 1982) 6, 12
EEOC v. Westinghouse Electric Corp., 33 FEP 390 (3d Cir. 1983) 7
Erdmann v. Bd. of Educ. Union City Reg. High School, 541 F. Supp. 388 (D. N.J. 1982) 11

TABLE OF AUTHORITIES—Continued

	Page
Farris v. Bd. of Ed. of City of St. Louis, 576 F.2d 765 (8th Cir. 1978)	10
Fowler v. Birmingham News Co., 608 F.2d 1055 (5th Cir. 1979)	4, 10
Guardian Ass'n of New York City v. Civil Serv., 633 F.2d 232 (2d Cir.), *cert. denied*, 452 U.S. 940 (1980)	10
Held v. Gulf Oil Co., 684 F.2d 527 (6th Cir. 1982)	10
Hodgson v. First Fed. Sav. & Loan Ass'n, 455 F.2d 818 (5th Cir. 1972)	14
Kesinger v. Universal Airlines, Inc., 474 F.2d 1127 (6th Cir. 1973)	22
Kremer v. Chemical Constr. Corp., 456 U.S. 461 (1985)	14, 15
Leite v. Kennecott Copper Corp., 558 F. Supp. 1170 (D.C. Mass), *aff'd*, 720 F.2d 658 (1st Cir. 1983)	13
Lockhart v. Firestone Tire & Rubber Co., 454 F. Supp. 191 (E.D. Va. 1970)	10
Macklin v. Spector Freight Systems, Inc., 478 F.2d 979 (D.C. Cir. 1973)	10
McDonald v. City of West Branch, —— U.S. ——, 104 S.Ct. 1799 (1984)	*passim*
McDonnell-Douglas Corp. v. Green, 411 U.S. 792 (1973)	15
Miller v. I.T.&T., 755 F.2d 20 (2d Cir. 1985)	6
Morelock v. NCR Corp., 586 F.2d 1096 (6th Cir. 1978), *cert. denied*, 441 U.S. 906 (1979)	6, 10
Oling v. Airline Pilots Ass'n, 346 F.2d 270 (7th Cir.), *cert. denied*, 382 U.S. 926 (1965)	22
Oscar Mayer & Co. v. Evans, 441 U.S. 750 (1980)	7
Pleasant Broadcasting Co. v. FCC, 564 F.2d 496 (D.C. Cir. 1977)	20
Reed v. Lockheed Aircraft Corp., 613 F.2d 757 (9th Cir. 1980)	10, 13
Rich v. Martin Marietta Corp., 522 F.2d 333 (10th Cir. 1975)	10
Trabucco v. Delta Airlines, Inc., 590 F.2d 315 (6th Cir. 1979)	10

TABLE OF AUTHORITIES—Continued

Page

United Air Lines, Inc. v. Evans, 431 U.S. 553 (1977) ..... *passim*
Whitney Nat'l. Bank v. Bank of New Orleans & Trust Co., 379 U.S. 411 (1965) 20, 21
Wilko v. Swan, 346 U.S. 427 (1953) 16

Statutes

5 U.S.C. § 706(2)(A) 19
28 U.S.C. §§ 1346(b), 2671, *et seq.* 22
29 U.S.C. § 626 ..... *passim*
42 U.S.C. § 2000e, *et seq.* ..... *passim*
49 U.S.C. § 1301, *et seq.* ..... *passim*
N.Y. Exec. Law § 290, *et seq.* 2

Civil Aeronautics Board Orders

Texas International Continental Acquisition Case, CAB Order 81-10-66 (1982) 18

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-878

PAN AMERICAN WORLD AIRWAYS, INC.; AIR LINE PILOTS ASSOCIATION, INTERNATIONAL; AIR LINE PILOTS ASSOCIATION, PAN AM CHAPTER; FLIGHT ENGINEERS INTERNATIONAL ASSOCIATION; FLIGHT ENGINEERS INTERNATIONAL ASSOCIATION, PAN AM CHAPTER,

Petitioners,

v.

JOHN C. COOK, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

---

RESPONDENTS' BRIEF IN OPPOSITION

Respondents, John C. Cook, et al., file this brief opposing the Petition for Writ of Certiorari ("Petition") filed by Pan American World Airways, Inc. ("Pan Am"); Air Line Pilots Association, International ("ALPA"); Air Line Pilots Association, Pan Am Chapter ("ALPA-PAA"); Flight Engineers International Association ("FEIA"); and Flight Engineers International Association, Pan Am Chapter ("FEIA-PAA").

I. STATEMENT OF THE CASE

On March 7, 1984, the 439 Respondents filed a Complaint in the District Court alleging, *inter alia*, that Petitioners Pan Am, ALPA, ALPA-PAA, FEIA, and FEIA-PAA (collectively "Unions") had violated the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 623-631 (1985), and New York Human Rights Law ("NYHRL"), N.Y. Exec. Law § 290, *et seq.* (1985), in implementing Pan Am's pilot seniority system. The Respondents filed this action as individual Plaintiffs pursuant to the ADEA, which incorporates by reference Sections 16(b) and 17, 29 U.S.C. §§ 216(b) and 217 of the Fair Labor Standards Act of 1938, as amended, 29 U.S.C. § 201 *et seq.* (1985). Respondents are not organized as an incorporated or unincorporated association. Respondents are all over 40 years of age, are and/or have been employed as pilots and/or flight engineers by Petitioner Pan Am and are members and/or apprentice members of Petitioner Unions.

Pan Am merged with National Airlines ("National") in 1980. Petitioner Unions submitted to an arbitrator the integration of the pilot and flight engineer seniority lists of the two merging companies. Petitioners ALPA and FEIA, through their respective chapters, represented Pan Am and National pilots and flight enginers. Pan Am expressly reserved the right to accept or reject the resulting arbitration award (the "Gill Award") which was issued on March 12, 1981. Pan Am subsequently accepted and later implemented the award in its entirety. See, Affidavit of Mr. Harold M. Gay, Appendix C, attached hereto (without exhibits which were part of record below).

Immediately after the issuance of the Gill Award, the integrated seniority list was challenged before the Civil Aeronautics Board ("CAB") by two groups of aggrieved Pan Am airmen. One group called itself "Pan American Pilots Fighting" ("PAPF") and was composed of uniden-

:ified active Pan Am airmen. The other group called itself the "Janus Group", an association of Pan Am airmen on furlough at the time the Gill Award was issued. The Petition of PAPF to Set Aside Arbitration Award and Agreement to Accept Award ("PAPF petition") was filed June 13, 1981. The PAPF petition contended that the integrated list was "unfair and inequitable" under the standard applied by the CAB to integrated airline seniority lists under the Federal Aviation Act, 49 U.S.C. § 1301 *et seq.* (1985). The PAPF petition did not include any claim or discussion of employment discrimination. The CAB ruled on PAPF's and the Janus Group's petitions in Order 82-4-75 (1982). The CAB did not set aside Pan Am's integrated pilot seniority list. *See,* Order 82-4-75 at 14, (Appendix A, attached hereto).

The integrated seniority system, as accepted by Pan Am, had not been posted by Pan Am at the time pleadings were filed before the CAB in the above proceeding. *See,* Petition, p. 6-7. The integrated seniority system was first implemented on a system-wide basis to the Respondents' disadvantage on March 28, 1983 and has been implemented continuously up until the present time. *See,* Affidavit of Mr. Harold M. Gay, Appendix C. Furthermore, Pan Am has exercised and continues to exercise wide discretion in implementing the pilot seniority system constructed under the Gill Award. *See* Affidavit of Mr. Harold M. Gay, Appendix C Respondents contend that Petitioner Unions have supported and/or acquiesced in such implementation and that the conduct of all parties violates the ADEA and the NYHRL.

II. REASONS THE WRIT SHOULD BE DENIED

A. Petitioners Are Appealing An Interlocutory Decision Of The Second Circuit Court Of Appeals, The Review Of Which By This Court At This Time Would Be A Waste Of This Court's Resources.

The Second Circuit Court of Appeals remanded this case to the United States District Court for the Southern District of New York for further proceedings consistent with the Second Circuit's opinion. Accordingly, Petitioners are asking this Court to grant a Writ of Certiorari in connection with an interlocutory decision. Rule 17 of the Supreme Court Rules states that "[a] review on Writ of Certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor." S. Ct. R. 17. This case does not present special and important reasons for review, and the Petition should accordingly be denied. This Court has stated in considering whether or not a Writ of Certiorari should be granted as to an interlocutory decision of a circuit court of appeals:

> While this power is co-extensive with all possible necessities and sufficient to secure to this Court a final control over the litigation in all the courts of appeals, *it is a power which will be sparingly exercised*, and only when the circumstances of the case satisfy us that the importance of the question involved, the necessity of avoiding conflict between two or more courts of appeal, or between courts of appeal and the Courts of a State, for some matter affecting the interest of this nation in its internal or external relations, demands such exercise.

Forsythe v. Hammond, 166 U.S. 506 (1896).

Respondents urge the Court to refrain from exercising this discretionary power of review in the absence of those circumstances outlined in *Hammond* and its own Rule 17.

Respondents recognize that the Court is not limited to those circumstances ennumerated by Rule 17. However, the absence of these factors is nonetheless significant to the Court's decision. *Watt v. Alaska*, 451 U.S. 259 (1981) (J. Stevens concurring). Furthermore, the fact that the present case is in the early stages of discovery and that the substantive issues remain largely undeveloped strongly demonstrates the improvidence of granting a Writ of Certiorari at this time. Accordingly, the Petition should be denied.

B. The Decision of the Second Circuit Court of Appeals on the Issue of Whether Respondents Have Alleged a "Continuing Violation" of the ADEA is Consistent with the Decisions of This Court and the Circuit Courts, and Presents No New Questions for This Court's Review.

Petitioners contend that this Court should review the Second Circuit's decision that Respondents' claims allege "continuing" violations of the ADEA in connection with the implementation and adoption of the pilot seniority system. Respondents disagree. This Court need not review the Second Circuit's decision on this issue, because it is wholly consistent with all applicable Supreme Court and federal appellate court precedent. Even assuming, *arguendo*, that Petitioners' ADEA violations in this case are not "continuing", Respondents' cause of action is not time-barred. Respondents properly filed administrative charges as to the Pan Am pilot seniority system within 300 days of the date when it first directly affected them. In any event, all issues regarding the dates of the unlawful occurrences in this case, and the dates upon which Respondents first filed administrative charges as to such occurrences, comprise factual disputes which can only be resolved at trial.

The ADEA requires that an individual wishing to challenge an illegal employment practice on age discrimina-

tion grounds must file an administrative charge with the federal EEOC within 180 days, or with a state equal employment agency (as Respondents so filed) within 300 days, of its occurrence. 29 U.S.C. § 626(d) (1985). In dismissing Petitioners' argument that Respondents' ADEA claims are time-barred, the Second Circuit stated as follows:

> When employees are hired or refused employment pursuant to a continuous policy of discrimination, the commencement of the statute of limitations period may be delayed until the last discriminatory act in furtherance of it . . . (Citations omitted.) *Adoption of a seniority system, if discriminatory as to age, constitutes a continuing violation of the ADEA* as long as that system is maintained by the employer. (Citations omitted.)

Cook v. Pan American World Airways, Inc., 771 F.2d 635 (2d Cir. 1985) (Petition, Appendix 1, p. A-25—A-26) (emphasis added), citing *Miller v. I.T.&T.*, 755 F.2d 20, 25 (2d Cir. 1985); *Ass'n Against Discrimination in Employment, Inc. v. City of Bridgeport*, 647 F.2d 256, 274 (2d Cir. 1981), *cert. denied*, 455 U.S. 988 (1982); *Morelock v. NCR Corp.*, 586 F.2d 1096, 1103 (6th Cir. 1978), *cert. denied*, 441 U.S. 906 (1979); *EEOC v. Home Insurance Co.*, 553 F. Supp. 704 (S.D.N.Y. 1982). Applying the above-stated principles, the Second Circuit held in *Cook* that "the *alleged discriminatory violations in the present case* must be classified as *continuous ones*, giving rise to claims accruing in favor of each plaintiff on each occasion when the merged seniority list was applied to him." *Id.* (emphasis added.) Each of the cases cited by the Second Circuit to support its decision involved claims similar to those raised by Respondents here, *i.e.*, that an employer's adoption and implementation of a particular policy, such as a seniority system, constituted an on-going practice of employment discrimination.

The Second Circuit's decision is consistent with all of this Court's rulings on the time limitations imposed on filing employment discrimination charges and lawsuits. *See Chardon v. Fernandez*, 454 U.S. 6 (1981); *Delaware State College v. Ricks*, 449 U.S. 250 (1980); *Oscar Mayer & Co. v. Evans*, 441 U.S. 750 (1980); *United Air Lines, Inc. v. Evans*, 431 U.S. 552 (1977). Petitioners attempt to contrive a conflict between the Second Circuit's decision in this case and this Court's holdings in *Ricks*, 449 U.S. 250, and *Evans*, 431 U.S. 552. As shown below, no such conflict exists.

This Court held in *Ricks* that the cause of action of the plaintiff, a college professor, accrued when he received notice that he was to be denied tenure, rather than when his contract actually terminated. Hence, plaintiff's charges, filed within the statutory period after his contract terminated but not after he received notice thereof, were held untimely. Petitioners quote *Ricks* with approval: "The proper focus (as to timeliness) is upon the time of discriminatory acts, not upon the time at which the consequences of the acts become most painful." *Id.* at 258. Contrary to Petitioners' misguided interpretation, the Second Circuit's decision comports with this holding.

The proper application of *Ricks* to the present case is contained in *EEOC v. Westinghouse Electric Corp.*, 33 FEP 390 (3rd Cir. 1983). The court in *Westinghouse* held that even though the adoption of a discriminatory policy constituted an unlawful employment practice, a cause of action against the policy could not accrue until the policy manifested itself through actual application to individual employees: "The mere adoption of this controversial policy in and of itself cannot be considered to constitute notice of the alleged discrimination." *Id.* The *Westinghouse* court declined to credit employees with "mystical powers of omniscience" whereby they could discern management's plans and projections. The pilots/

flight engineers who are Respondents here cannot be considered to possess such powers either. *Ricks* does *not* hold that a plaintiff's claim accrues on the first date on which the *potential* for discrimination existed, as Petitioners attempt to argue. In this case, *Ricks* simply requires that pilots affected by a particular set of reassignments and/or furloughs effectuated under the Pan Am pilot seniority system file administrative charges within the statutory time period after the date they receive final notice of the pending reassignments and/or furloughs, rather than the date on which they are actually demoted or laid off. Respondents have complied with this requirement. In fact, Respondents could still file "fresh" charges at any time, since Petitioner Pan Am continues to this day to effectuate discriminatory pilot reassignments under the challenged system.

Petitioners also grossly mischaracterize this Court's holding in *Evans*. The plaintiff in *Evans* was employed by United Air Lines ("United") as a flight attendant from November 1966 to February 1968. She was forced to resign in 1968 because of United's then-prevailing policy of refusing to allow its female flight attendants to be married. It was subsequently decided that such a policy violated Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.* (1985) ("Title VII"). When the plaintiff in *Evans* was reinstated, she charged that her loss of seniority rights for the period between 1968 and 1972 constituted a second violation of Title VII. Plaintiff contended that because her subordinated position on the seniority list had a continuing impact on her pay and fringe benefits, United was guilty of a present and continuing violation of Title VII, and therefore her claim was timely. This Court held that where a seniority system *only* gives present effect to a *past* act of discrimination, it does not constitute a continuing violation of Title VII. Petitioners quote the Court as stating that "the emphasis should not be placed on mere continuity; the

critical question is whether any present *violation* exists." *Id.* at 1889. What Petitioners do *not* quote are the next two sentences:

> [Plaintiff] *has not alleged that the system discriminates* against former female employees or that it treats former employees who are discharged for a discriminatory reason any differently from former employees who resigned or were discharged for a non-discriminatory reason. *In short, the system is neutral in its operation.*

Id. (emphasis added.)

In *Evans*, the only allegation of employment discrimination which the plaintiff could raise occurred in the period before she was even assigned the seniority position of which she complained. She could allege nothing to indicate that United's seniority system treated "existing female employees differently from existing male employees . . . (She) has failed to allege that United's seniority system differentiates between similarly situated males and females on the basis of sex." *Id.* Respondents' Complaint, by contrast, avers that Pan Am's pilot seniority system is *not* "neutral in its operation." *See* Respondents' Complaint, attached hereto as Appendix B, paragraphs 11-18 (without appendices which are part of the Petition). Respondents have specifically charged that by their present and continuing implementation of this seniority system by new pilot assignments, furloughs, and other actions, Petitioners commit willful and continuous acts of discrimination in violation of the ADEA.

Indeed, *Evans* supports the Respondents' position by acknowledging that if the plaintiff in that case *had* been able to allege present and continuing discrimination in the operation of the disputed seniority system, as do the Respondents here, the continuing violation theory would have been applicable. In sum, the Second Circuit's decision is perfectly consistent with this Court's holdings and statements on the timeliness of employment discrimination charges and lawsuits.

Furthermore, the Second Circuit's decision is consistent with those of *every* Circuit which has confronted this issue in the context of claims similar to those of Respondents. Appellate courts in *nine* circuits have faced the issue of whether a "continuous" employment practice can be challenged as violating federal anti-discrimination statutes during the entire duration of its implementation. *All* have rendered decisions in favor of plaintiffs and consistent with that of the Second Circuit in this case. *See, e.g., Guardian Ass'n of New York City v. Civil Serv.*, 633 F.2d 232 (2d Cir.), *cert. den'd*, 452 U.S. 940 (1980); *Acha v. Beame*, 570 F.2d 57 (2d Cir. 1978); *Bethel v. Jendoco*, 570 F.2d 1168 (3d Cir. 1978); *Clark v. Olinkraft Inc.*, 556 F.2d 1219 (5th Cir. 1977); *Held v. Gulf Oil Co.*, 684 F.2d 527 (6th Cir. 1982); *Morelock*, 586 F.2d 1096 (6th Cir.); *Cox v. United States Gypsum Co.*, 409 F.2d 209 (7th Cir. 1969); *Cedeck v. Hamiltonian Federal Sav. & Loan Ass'n*, 551 F.2d 1136 (8th Cir. 1977); *Reed v. Lockheed Aircraft Corp.*, 613 F.2d 757 (9th Cir. 1980); *Rich v. Martin Marietta Corp.*, 522 F.2d 333 (10th Cir. 1975); *Macklin v. Spector Freight Systems, Inc.*, 478 F.2d 979 (D.C. Cir. 1973).

The employment discrimination cases cited by Petitioners as supposedly undercutting the Second Circuit's decision are in fact irrelevant to it.[1] Without exception, the facts in those cases parallel, and the holdings thus rely upon, either *Ricks*[2] or *Evans*[3] and are thus inapplicable

---

[1] *See Bronze Shields, Inc. v. N.J. Dept. of Civil Serv.*, 667 F.2d 1074 (3d Cir. 1981); *Aronsen v. Crown Zellerbach*, 662 F.2d 584 (9th Cir. 1981); *Fowler v. Birmingham News Co.*, 608 F.2d 1055 (5th Cir. 1979); *Trabucco v. Delta Airlines, Inc.*, 590 F.2d 315 (6th Cir. 1979); *Farris v. Bd. of Ed. of City of St. Louis*, 576 F.2d 765 (8th Cir. 1978); *Lockhart v. Firestone Tire & Rubber Co.*, 454 F. Supp. 191 (E.D. Va. 1970).

[2] *See Bronze Shields*, 667 F.2d 1074; and *Aronsen*, 662 F.2d 584.

[3] *See Fowler*, 608 F.2d 1055; *Farris*, 576 F.2d 765; *Trabucco*, 590 F.2d 315; and *Lockhart*, 454 F. Supp. 191.

here, for the same reasons set forth in the above discussion of *Ricks* and *Evans*. For example, Petitioners rely heavily on the inapposite *Bronze Shields, Inc. v. N.J. Dept. of Civil Serv.*, 667 F.2d 1074 (3d Cir. 1981). In that case, candidates for police officer positions broadly charged that a hiring roster, from which defendants were to select all police officers, was race discriminatory. But plaintiffs only specifically alleged discrimination in the defendants' administration of a test which was the first step of a multi-step selection process and determined which candidates would be eliminated from further consideration for the police officer positions. After these candidates had already been eliminated, the remaining candidates were, in a separate action undertaken by defendants, placed on the disputed hiring roster in accordance with the results of the test. Plaintiffs in *Bronze Shields* did not allege that defendants' placement of the remaining candidates on the roster, nor that defendants' subsequent actions based on the roster, were discriminatory. Hence, the court held as untimely administrative charges filed within 300 days of the construction of the roster but not of the issuance of the results of the allegedly discriminatory test. By contrast, Respondents allege that the Petitioner violated the ADEA in the *actual construction and implementation* of the Pan Am pilot system, and hence their lawsuit is timely.

Contrary to Petitioners' far-fetched assertion that it would disturb for employers "economic predictability in an uncertain world," the Second Circuit's decision strikes the proper balance between the interests of employers and employees in the enforcement of time limitations on employment discrimination charges. The traditional rationale for such limitations is that employers "should not be unreasonably burdened with preserving for years complete records of each and every employment decision." *Erdmann v. Bd. of Educ. Union City Reg. High School*, 541 F. Supp. 388 (D. N.J. 1982). The continuing viola-

tion theory recognizes that, when a seniority system is the subject of a discriminatory charge, "the defendant employer is not burdened with the necessity of justifying each particular instance of alleged discrimination, but rather may successfully defend against all claims by justifying the practice challenged as a whole." *Id.* at 393. As noted by the Second Circuit in *EEOC v. Home Insurance Co.*, 553 F. Supp. at 713:

> [Where a continuing violation can be alleged] the concern respecting production of evidence as to past acts is considerably diminished. *Simply put, an employer that maintains a continuing violation neither deserves nor obtains repose.*

Id. (emphasis added).

Even if the discriminatory acts committed by Petitioners were not "continuing" in nature, as they clearly are, Respondents' ADEA cause of action is still timely.

Petitioners allege that the seniority list complained about in this case was implemented, at the latest, in September 1981, when it was allegedly first posted. Petition at 6-7. Therefore, according to Petitioners, because the administrative charges which are made the basis of this action were not filed with the EEOC until April 12, 1983, such charges were not filed within 300 days of the alleged illegal occurrence and thus should be dismissed. Respondents disagree. As demonstrated by the affidavits of Mr. Harold M. Gay, Jr., Mr. Charles E. Eager and Mr. Robert L. Jarboe (attached hereto as Appendix C), the seniority system adopted by Pan Am and complained about in this case was not implemented to Respondents' detriment or disadvantage until March 28, 1983. On that date, numerous plaintiffs were for the first time demoted and three plaintiffs were first notified that they were to be furloughed as a result of the operation of Pan Am's pilot seniority system. No Pan Am pilot over age 40 suffered discriminatory demotion as a result of the Pan

Am pilot seniority system until that date. Hence, Respondents' cause of action arose when Pan Am's pilot seniority system first directly affected them, on March 28, 1983. *See* affidavits of Messrs. Gay, Jarboe and Eager.

In any event, Respondents note that it is well established that any question concerning the date of occurrence of an alleged discriminatory practice is a question of fact which must be resolved at trial. *See, e.g., Reed*, 613 F.2d at 761; *Leite v. Kennecott Copper Corp.*, 558 F. Supp. 1170 (D.C. Mass), *aff'd*, 720 F.2d 658 (1st Cir. 1983). Hence, this issue would not be a proper subject for review by this Court.

C. The Decision of the Second Circuit Court of Appeals on the Collateral Attack Issue Is Consistent With The Decisions of This Court and the Circuit Courts and Presents No New Questions for this Court's Review.

The Second Circuit held that because the ADEA provides for *de novo* adjudication of age discrimination claims, and because the CAB lacked the authority or expertise to adjudicate the age discrimination issues presented in this case, Respondents' lawsuit is not barred as a "collateral attack" on a CAB order. The Second Circuit correctly stated that the starting point for consideration of whether Respondents' lawsuit is barred by virtue of the previous CAB proceeding lies in Supreme Court decisions upholding *de novo* judicial determination of claims asserted under federal laws similar to the ADEA.[4] Such cases, and Respondents' entitlement to a jury trial of their ADEA claims, form the basis of the Second Circuit's decision—a basis which Petitioners neglect to even mention in their Petition.

---

[4] *See, e.g., McDonald v. City of West Branch*, —— U.S. ——, 104 S.Ct. 1799 (1984); *Barrentine v. Arkansas-Best Freight System, Inc.*, 450 U.S. 728 (1981); *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974).

1. *The Second Circuit Court of Appeals properly followed decisions of this Court and the circuit courts entitling Respondents to a jury trial in U.S. district court of their employment discrimination complaint.*

The ADEA entitles Respondents to a jury trial of their age discrimination claims in a United States district court. The ADEA specifically states:

> 7(c)(1). Any person aggrieved may bring a civil action in any court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this Chapter . . . (2) any person filing an action under (1) above shall be entitled to a trial by jury of any issue of fact in any such action for recovery of amounts owing as a result of a violation of this Chapter, regardless of whether equitable relief is sought by any party in such action.

29 U.S.C. § 626(c) (1985).

The Second Circuit's decision is consistent with the decisions of this Court and the decisions of other federal courts of appeal which have interpreted this provision of the ADEA. Specifically, as the Second Circuit indicated, its decision in this case is consistent with this Court's decisions in *McDonald v. City of West Branch*, —— U.S. ——, 104 S.Ct. 1799 (1984), *Kremer v. Chemical Constr. Corp.*, 456 U.S. 461 (1982), *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974) and *Baldwin v. New York*, 399 U.S. 66 (1970).

The ADEA was enacted three years after Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.* (1985). With a few minor exceptions, the prohibitions of the ADEA are in terms identical to those of Title VII. *Hodgson v. First Fed. Sav. & Loan Ass'n*, 455 F.2d 818 (5th Cir. 1972). Courts have traditionally applied interpretations of Title VII's provisions, particularly those vesting substantive employment rights, to cases arising under the ADEA. *Id.* at 820.

One of the established principles of Title VII, and hence ADEA, case law is that jurisdiction over civil actions under these statutes lies exclusively in the federal courts. *Gardner-Denver*, 415 U.S. at 36; *Dickinson v. Chrysler Corp.*, 456 F. Supp. 43 (E.D. Mich. 1978). No federal or state agency can intrude on the "ultimate responsibility" held by the federal courts to enforce federal employment discrimination statutes. *Kremer*, 456 U.S. at 469. The Second Circuit's decision is consistent with these principles.

Plaintiffs in both ADEA and Title VII actions are entitled to a *de novo* adjudication of their claims (*i.e.*, an adjudication which guarantees an opportunity to present all relevant factual evidence for fresh determination by a federal district court factfinder). *Kremer*, 456 U.S. at 469; *McDonnell-Douglas Corp. v. Green*, 411 U.S. 792 (1973). The Second Circuit's decision properly safeguards this right. Even the administrative rulings of the EEOC, the agency which was created by Congress for the specific purpose of monitoring enforcement of federal employment discrimination laws and which has far greater experience and expertise in this area than the CAB, are subject to *de novo* adjudication in federal court. *McDonnell-Douglas*, 411 U.S. at 799. *See also Kremer*, 456 U.S. at 469. The establishment of such a *de novo* federal court procedure was motivated by Congress' fear that officers of administrative agencies would be prone to political pressures and thus unable to impartially adjudicate employment discrimination claims. *See Chandler v. Roudebush*, 425 U.S. 844 (1976).

The terms of the ADEA, which expressly provide litigants with a right to a jury trial of age discrimination claims, and this Court's holdings requiring that trials of *any* federal employment discrimination claim be *de novo*, are violated if a plaintiff is barred from obtaining a full-fledged adversarial proceeding on such claims in federal court. *See Gardner-Denver*, 415 U.S. 36. The Second Cir-

cuit's decision in this case in consistent with and follows *Gardner-Denver*. In comparing the procedures followed in federal court with those followed in a labor arbitration, this Court stated in that case:

> The factfinding process in arbitration is not equivalent to judicial factfinding. The *record* of the arbitration proceedings *is not as complete*; the usual *rules of evidence do not apply*; and rights and procedures common to civil trials, such as *discovery, compulsory process, cross-examination* and *testimony under oath*, are often *severely limited or unavailable*. *See Bernhardt v. Polygraphic Co.*, 350 U.S. 198 (1956); *Wilko v. Swan*, 346 U.S. 427 (1953).

415 U.S. at 1024 (emphasis added). The Court in *Gardner-Denver* held that an arbitration is a less appropriate forum for final resolution of Title VII issues than a federal court, and that a Title VII litigant is entitled to a trial *de novo* in federal court of his discrimination claims even if he had completely litigated such claims in an arbitration proceeding which resulted in an unfavorable outcome. *See also McDonald*, 104 S.Ct. 1799 (1984).

For the following two reasons, Respondents' entitlement to a federal court jury trial of their ADEA claims is more substantial than that of the plaintiffs in *Gardner-Denver*, who successfully argued that they had a right to a federal court trial of their Title VII claims:

1. The arbitration procedure which this Court deemed inadequate to make a final determination in a discrimination case generally involves a much more rigorous factfinding process than was conducted by the CAB in relation to the PAPF petition. *See* Order 82-4-75 at 4, attached hereto as Appendix A.

2. Unlike in *Gardner-Denver*, where the same discrimination claim was presented to an arbitrator and then to a federal district court, the Complaint filed in District Court by Respondents con-

> tained a totally different set of factual and legal contentions than were embodied in the PAPF petition and ruled upon by the CAB.

In connection with the first reason stated above, Respondents note that the CAB proceeding on the PAPF petition that resulted in Order 82-4-75 provided none of the safeguards mandated by *Gardner-Denver*, and, unlike an arbitration proceeding, did not include an evidentiary hearing or provide the parties an opportunity to cross-examine witnesses. *See* Order 82-4-75 at 4 (Appendix A). Even if ADEA claims had been asserted before the CAB, which they were not, the procedures utilized by the CAB would have been less adequate than the arbitration procedure deemed unsatisfactory in *Gardner-Denver*. In processing the PAPF petition, the CAB did not compile a record of the sort of statistical evidence which substantiates Respondents' Complaint here. *Id.* In fact, when PAPF submitted for the CAB's consideration seniority lists in support of its claim that the integrated system was not "fair and equitable" under the Federal Aviation Act, the CAB refused to consider such documents and stated:

> [PAPF's] material contains facts about named employees' seniority. We do not rely upon this information in ruling on PAPF's Petition; therefore, its disclosure to the parties in the proceeding or the public is unnecessary. The material will be returned to PAPF after the instant order issues.

Id. In accordance with its standard procedures, the CAB expressly restricted its inquiry by stating:

> [*Our responsibility*] *is confined to examining whether the arbitration* [*which yielded the Gill Award*] *was fairly and equitably conducted.*

Order 82-4-75 at 4.

Furthermore, PAPF's petition and documents were submitted to the CAB on June 13, 1981, before Pan Am

had even posted the integrated pilot seniority list. *See* Petition at 6-7. As Petitioners admit and as the Second Circuit made clear, age discrimination claims were never raised before the CAB, and even if such claims had been raised, the CAB would not and could not have afforded Respondents the factfinding process guaranteed them by the ADEA and *Gardner-Denver*. As was pointed out by the Second Circuit, the CAB (now Department of Transportation ["DOT"]) has no interest or expertise in age discrimination matters. In a 1981 order, the CAB acknowledged that "our jurisdiction is limited, we lack expertise in labor relations, and there are better equipped, more competent forums available to handle labor disputes." *Texas International/Continental Acquisition Cases*, CAB Order 81-10-66, at 11.[5]

In connection with the second reason stated above in support of Respondents' argument that their right to a federal court trial is more substantial than that asserted in *Gardner-Denver*, Respondents state that their Complaint contains totally different legal and factual contentions than those contained in the PAPF petition ruled on by the CAB. Respondents' Complaint in this case, as well as the affidavits and exhibits supporting Respondents' opposition to dismissal, allege that Petitioners have violated the ADEA and NYHRL in the adoption and implementation of the Pan Am pilot seniority system. *See* Complaint (attached hereto as Appendix B). The PAPF petition to the CAB did not so allege. Respondents' Complaint goes far beyond the PAPF petition in alleging that the implementation of the integrated pilot seniority lists

---

[5] The CAB monitored the Pan Am-National merger to assure that it was "consistent with the public interest", 49 U.S.C. § 1378 (1985), and imposed a condition that the companies' seniority lists be integrated in a "fair and equitable" manner (to minimize the possibility of labor unrest which would inconvenience the traveling public). That was the extent of its authority, or even interest, in this matter.

of Pan Am and National, continuing to this day, violates federal and state age discrimination statutes. These allegations of on-going violations, and in fact all of Respondents' contentions in this case, are separate and apart from the question of whether the integration of Pan Am's and National's pilot seniority lists was procedurally fair, such being the issue considered by the CAB. By contrast, the plaintiff's discrimination allegations in *Gardner-Denver* had been specifically raised before and decided by an arbitrator, and this Court still considered a federal court trial to be required. Such a trial is clearly required in this case also, and the Second Circuit's decision on this issue is consistent with this Court's decision in *Gardner-Denver.*

Even had the Respondents raised their ADEA claims to the CAB, the Court of Appeals for the District of Columbia Circuit would not have reviewed those claims *de novo.* The appellate court's review of an order such as that issued by the CAB is limited to whether it was "arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A) (1985). Hence, the appellate court would have been called upon to determine the merits of an employment discrimination claim by simply reviewing the record of proceedings before an administrative agency. In *Chandler, supra,* this Court explicitly rejected such an attenuated standard of review as an unacceptable substitute for a federal district court's *de novo* adjudication of an employment discrimination complaint. 425 U.S. at 843-844. Furthermore, even if such a review of the CAB's Order by the D.C. Circuit could have been *de novo* (which it could not) and even if such a review could have dealt with Respondents' ADEA claims (which it could not as PAPF never asserted and the CAB never considered such), review of the CAB's Order by the D.C. Circuit obviously could not deal with Respondents' ADEA claims relating to events which have occurred since the CAB issued its Order.

The Second Circuit's rejection of Petitioners' assertions is proper and consistent with rulings of this Court.

2. *The decision of the Second Circuit Court of Appeals is consistent with the decisions of this Court and the circuit courts on the collateral attack issue.*

Petitioners mistakenly argue that the Second Circuit decision conflicts with Supreme Court and federal circuit court precedent on the collateral attack issue. On the contrary, the Second Circuit decision is wholly consistent with such precedent.

The collateral attack doctrine holds that where Congress has prescribed the "specific, complete and exclusive" mode for judicial review of an administrative agency's orders, alternative avenues of appeal are prohibited. *City of Tacoma v. Taxpayers of Tacoma*, 357 U.S. 320 (1958). The collateral attack doctrine is properly applied in cases in which "it is unlikely that Congress intended for . . . petitioners to have two bites at the apple—that is, to be able to challenge the order in a court of appeals on the basis of an administrative record, and if unsuccessful, to litigate all issues *de novo* in the district court with the right of appeal to the court of appeals." *Pleasant Broadcasting Co. v. FCC*, 564 F.2d 496 (D.C. Cir. 1977). The doctrine's rationale has been explained by this Court as follows:

> Where Congress has provided statutory review procedures designated to permit agency expertise to be brought to bear on particular problems, those procedures are to be exclusive . . . [Congress intended] to permit an agency, expert in [particular] matters, to explore and pass on the ramifications of [those matters].

Whitney Nat'l Bank v. Bank of New Orleans & Trust Co., 379 U.S. 411 (1965).

As age discrimination allegations were not raised before the CAB and as PAPF is not synonymous with the Respondents herein, Respondents are not attempting via this litigation to obtain "two bites of the apple." In addition, the collateral attack doctrine is plainly inapplicable to the present case because Congress explicitly designated the federal courts and the EEOC as the repositories of expertise on employment discrimination and has accordingly placed exclusive authority over such claims in those forums. The CAB simply did not have the authority to issue a final determination on an employment discrimination claim, and clearly indicated that its Order did not decide such issues. The factual and legal issues raised by the Complaint in this case were not subjected to the scrutiny of the CAB, nor should they have been.

Clearly, as shown above, the Second Circuit's decision accords with this Court's interpretation of the collateral attack doctrine, as enunciated in cases such as *City of Tacoma* and *Whitney Nat'l Bank*, *supra*. Specifically, the Second Circuit's decision does not conflict with this Court's decision in *City of Tacoma*, 357 U.S. at 320, as argued by Petitioners. The Court in *City of Tacoma* invoked the collateral attack doctrine in barring a state court action on the grounds that the plaintiffs raised the identical issue in the court (*i.e.*, the legality of a license issued by a federal administrative agency) that it had earlier raised before the agency itself. This Court also found the agency competent to decide the issue. As the Second Circuit indicated, the collateral attack doctrine does not bar a lawsuit where, unlike in *City of Tacoma*, the administrative agency, here the CAB, is neither authorized nor competent to decide the issue later raised in a separate action. The district court has jurisdiction to entertain such a later claim. *See, e.g., Beins v. United States*, 695 F.2d 591 (D.C. Cir. 1982).

Regarding the decisions of other circuits, Petitioners claim that the Second Circuit's decision conflicts with *Carey v. O'Donnell*, 506 F.2d 107 (D.C. Cir. 1974), *cert. denied*, 419 U.S. 1110 (1975); *Kesinger v. Universal Airlines, Inc.*, 474 F.2d 1127 (6th Cir. 1973); and *Oling v. Airline Pilots Ass'n*, 346 F.2d 270 (7th Cir.), *cert. denied*, 382 U.S. 926 (1965). Petitioners' argument is without merit. As the Second Circuit correctly pointed out, no ADEA, Title VII or similar claims were asserted in *Kesinger* or *Oling*, nor was the substantive fairness of integrated seniority lists even adjudicated in those cases. Rather, *Kesinger* and *Oling* dealt with whether the unions had breached their duty of fair representation before the CAB. This issue was clearly within the CAB's expertise, as employment discrimination issues are just as clearly not. Hence, the rulings in *Kesinger* and *Oling* barring the relitigation of CAB issues were properly distinguished by the Second Circuit from this case.

The Second Circuit also deemed inapplicable the D.C. Circuit's decision in *Carey*, 506 F.2d at 107. Petitioners contend that the Second Circuit's treatment of *Carey* justifies this Court's review of its decision. Respondents disagree, for two reasons.

First, the D.C. Circuit has since limited the applicability of *Carey* by deciding *Beins v. United States*, 695 F.2d 591 (D.C. Cir. 1982). In *Beins*, the D.C. Circuit held that a pilot who had been denied an airman medical certificate by the Federal Aviation Administration ("FAA") could maintain an action in U.S. district court against the FAA under the Federal Tort Claims Act ("FTCA"), 28 U.S.C. §§ 1346(b), 2671, *et seq.* (1985). The court ruled that the pilot was not restricted to appealing the FAA's action directly to the D.C. Circuit under Section 1006 of the Federal Aviation Act, 49 U.S.C. § 1486 (a) (1985), but could obtain a trial of his FTCA claims in

district court. *Beins* effectively limits the reach of *Carey* to cases in which (1) appeal of an agency order to the court of appeals would provide "an adequate means of reviewing Appellants' allegations in the district court suit," (2) the Appellants are seeking a remedy in the district court which they could have obtained in the court of appeals; and (3) Congress has not established a separate statutory procedure as a means of adjudicating the subject matter at issue. *Id.* at 598 and fn. 11. None of these requirements is present in this case. By implication, the current position of the D.C. Circuit on this issue accords with that expressed by the Second Circuit in this case.

Second, to the extent *Carey* would nullify the rights of ADEA litigants to federal court jury trials of their claims, it has been rendered meaningless by *Chandler v. Roudebush*, 425 U.S. 844 (1976). *Chandler* and other cases decided after *Carey* have assured all litigants of a trial *de novo* of federal discrimination complaints, even following determination of such claims by administrative agencies with employment discrimination expertise. As indicated above, the CAB clearly has no such expertise.

The Second Circuit's decision in this case is thus not inconsistent with the D.C. Circuit's prevailing interpretation of *Carey*, nor with the view of any other circuit on the collateral attack issue. Even if the construction of *Carey* advanced by Petitioners could be considered the law of the D.C. Circuit and applicable here, which it cannot for the reasons stated above, such construction would be at odds with *McDonald, supra, and Gardner-Denver, supra*, decisions of this Court which must control. This Court has repeatedly defended and protected the right of all litigants to a trial *de novo* of federal discrimination complaints. It should not now allow Petitioners to erode that right.

III. CONCLUSION

For the reasons stated above, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

JEFFREY C. LONDA
Counsel of Record
BUTLER & BINION
1600 Allied Bank Plaza
Houston, Texas 77002
(713) 237-3270

ROBERT E. COHN
KEVIN FLYNN
SHAW, PITTMAN, POTTS
& TROWBRIDGE
1800 M Street, N.W.
Washington, D.C. 20036
(202) 822-1060

Attorneys for Respondents

JEFFERY BERNBACH
521 Fifth Avenue
New York, New York
(212) 687-9730

Of Counsel for Respondents

APPENDICES

APPENDIX A

Order 82-4-75

UNITED STATES OF AMERICA
CIVIL AERONAUTICS BOARD
WASHINGTON, D.C.

Adopted by the Civil Aeronautics Board
at is office in Washington, D.C.,
on the 15th day of April, 1982

Docket 33283

In the matter of

PAN AMERICAN-ACQUISITION OF CONTROL
OF, AND MERGER WITH NATIONAL

Motion of flight enginers formerly in the employ of National for confirmation and enforcement of arbitration award;

Petition of Janus Group to set aside arbitration award; and

Petition of Pan American Pilots Fighting to set aside arbitration award.

ORDER DISMISSING MOTION AND PETITIONS

This proceeding arises out of Pan American World Airways' acquisition of control of and merger with National Airlines, effective January 19, 1980, which the Board approved by Orders 79-12-163/164/165. Before the Board are three requests concerning an arbitration award which resolved disputes among National and Pan American flight engineers and pilots about their integrated seniority at the combined carrier, Pan American. The award established, from the employees' standpoint, two integrated seniority lists for the merged employee groups.

When the lists were presented to Pan American by the employees' bargaining representatives, the carrier accepted and implemented them.[1]

Flight enginers formerly employed by National, apparently sponsored by National Enginers, have filed a "Motion for Confirmation and Enforcement of [the] Arbitration Award." Petitions to set aside the award have been filed by (1) Janus Group, a group formed at the time of approval proceedings before the Board to represent 510 furloughed (premerged) Pan American crewmen; and (2) Pan American Pilots Fighting ("PAPF"), a group of unidentified (premerged) Pan American crewmen who joined together after the arbitration award issued to oppose it.

Our jurisdiction to consider the requests stems from section 408 of the Federal Aviation Act of 1958, as amended, 49 U.S.C. § 1378, which subjects air carrier acquisitions and mergers to Board approval upon terms and conditions that are just and reasonable. In following this mandate, we impose and retain jurisdiction over labor protective provisions ("LPP's") benefitting employees at combining companies in certain ways. The basis for the relief sought in the motion and petitions would be, therefore, that merged Pan American and the bargaining representatives for flight deck personnel at premerged National and Pan American failed to inte-

---

[1] The Flight Engineers' International Association ("FEIA") was the certified collective-bargaining agent, under the Railway Labor Act, for flight engineers at National and Pan American through its respective airline chapters. The Air Line Pilots Association, International ("ALPA"), through its master executive councils at each airline, was the agent for the carriers' pilots. Such agents are the appropriate representatives of employees affected by an acquisition or merger for purposes of bargaining with the combined carrier about integrated seniority. These four labor representatives (herein called National Engineers, Pan Am Engineers, National Pilots, and Pan Am Pilots) were the parties to the arbitration in issue.

grate seniority as required by the LPP's in our approval order which provide that,

> Section 3. Insofar as the merger affects the seniority rights of the carriers' employees, provisions shall be made for the integration of seniority lists in a fair and equitable manner, including, where applicable, agreement through collective bargaining between the carriers and the representatives of the employees affected. In the event of failure to agree, the dispute may be submitted by either party for adjustment in accordance with section 13.

We have long held that, pursuant to section 3, the surviving carrier of an acquisition or merger and the affected employees (by their representatives in terms of the Railway Labor Act if they are organized) are responsible for integrating seniority lists. Only when the carrier and the employees/representatives disagree on seniority do we intrude, by ensuring that the parties arbitrate.

> Section 13(a). In the event that any dispute or controversy * * * arises with respect to the protections provided herein, which cannot be settled by the parties within 20 days after the controversy arises, it may be referred by any party to an arbitrator * * *. The decision of the arbitrator shall be final and binding on the parties.

Here, the four representatives for cockpit crew members affected by the acquisition agreed to a procedure for determining, among themselves, how to integrate seniority. The procedure required final and binding arbitration if they could not decide upon an integrated seniority proposal to submit to Pan American. The procedure also required that the representatives jointly support, in collective bargaining with the company, the proposal thus formulated. Nevertheless, we are presented with a claim by National Engineers that Pan Am Engineers refuses to support the lists established in the intra-union arbitration

because Pan Am Engineers disagrees with how the award deals with certain aspects of its members' seniority. The National Engineers states that Pan Am Engineers, instead, tried to negotiate seniority for its members with Pan American by asking the company to change the award and implement lists at variance with it. Failing Pan American's acceptance of the proposal, Pan Am Engineers asked the company to arbitrate flight deck personnel seniority under section 13(a) of the LPP's. After the National Engineers' motion was filed, however, Pan American refused to bargain separately with Pan Am Engineers. Pan American acknowledged the intra-union procedural agreement and Pan Am Engineers' commitment to abide by the arbitration award as the integration proposal on behalf of all crewmen. Pan American decided to accept, unchanged, the lists developed by the award. Although Pan Am Engineers has again asked Pan American to arbitrate integrated seniority, for reasons more fully explained below, we are satisfied that Pan American, in this case, fulfilled its duty pursuant to the LPP's to integrate flight engineer and pilot seniority fairly and equitably. There is, accordingly, no necessity for ruling on National Engineers' motion to confirm and enforce the arbitration award. We dismiss the motion as moot.

We dismiss the petitions to set the arbitration award aside. Janus Group and PAPF speak for certain former Pan American crewmen dissatisfied with the substance of the award. These employees contend that, because the award's seniority lists are unfair and inequitable to them, it must be invalidated. They contend that, in order to comply with section 3 of the LPP's, their spokesman, along with the four certified bargaining representatives for Pan American and National crewmen, must bargain anew with Pan American about integrated seniority and, if necessary, arbitrate the matter under LPP section 13(a). Our authority, however, over arbitration volun-

tarily undertaken by employee representatives in connection with a Board-approved acquisition or merger "is confined to examining whether the arbitration was fairly and equitably conducted." Furthermore, "an employee is bound by the resolution of seniority and other disputes by his authorized bargaining representative in negotiations or binding arbitration, unless the employee can show that the resolution was tainted by the union's breach of its duty of fair representation." [2] We find below that Janus Group and PAFP have not shown that the procedure used by their members' certified bargaining representatives was defective or that the representatives breached their duty of fair representation of Janus Group and PAPF members.

* * * *

Based on the record before us,[3] we find that:

---

[2] *Allegheny-Mohawk Merger Case (Complaint of Kingston and Foster)*, Order 79-11-53 at 17, *aff'd sub nom. Kingston, et al.* v. *CAB*, No. 80-1028 (D.C. Cir., decided without opinion March 6, 1981).

[3] Numerous pleadings from parties affected by the pilot-flight engineer problem at Pan American were filed in this case. We docket and entertain all filings received on or before September 3, 1981. Accordingly, the motions received by September 3 for leave to file otherwise unauthorized documents pursuant to Rule 4(f) of our Procedural Regulations, 14 C.F.R. § 302.4(f), are granted.

We grant PAPF's request on July 13, 1981, for confidential treatment under Rule 39, 14 C.F.R. § 302.39, of portions of the text and Exhibits B through L of PAPF's petition to set aside the arbitration award filed the same date. The material contains facts about named employees' seniority. We do not rely upon this information in ruling on PAPF's petition; therefore, its disclosure to the parties in the proceeding or the public is unnecessary. The material will be returned to PAPF after the instant order issues.

We deny Pan Am Engineers' motion filed April 30, 1981, to strike National Engineers' motion for confirmation and enforcement of the arbitration award. We deny Pan American's motion filed August 7, 1981, for expedited action.

The seniority procedural agreement signed by National Engineers, Pan Am Engineers, National Pilots, and Pan Am Pilots. On March 19, 1980, following Pan American's merger with National on January 19, 1980, the four labor organizations representing the carriers' flight engineers and pilots agreed to a procedure that they would use to determine integrated seniority. Pan American was not a party to the agreement since its purpose was to produce the proposal for seniority integration that the union representatives would advance in collective bargaining with Pan American as required by LPP section 3.[4]

The procedure called for negotiation by the union parties, who had "complete and full authority to act for and in behalf of their respective employee groups for the purpose of integrating the seniority lists of pilots and flight engineers" (paragraph 2). Absent negotiated consensus, mediation must follow. And if integration was not agreed

---

[4] The labor parties referred to the procedural agreement as complying with section 13(b) of the LPP's (introductory paragraph 2). They are mistaken. Section 13(b) reads,

> (b) The above condition [in (a) for arbitration] shall not apply if the parties by mutual agreement determine that an alternative method for dispute settlement or an alternative procedure for selection of an arbitrator is appropriate in their particular dispute. No party shall be excused from complying with the above condition by reason of having suggested an alternative method or procedure, unless and until that alternative method or procedure shall have been agreed to by all the parties.

We have held that this provision means exactly what it says. *North Central-Southern Merger Case (Petition of IAM)*, Order 81-6-56 at 3. It permits an "alternative method" to arbitration as settlement for a "particular dispute" arising out of seniority bargaining between a carrier and employees/representatives under section 3, when "the parties" to the dispute mutually agree to the alternative. Section 13(b) is not relevant to how the representatives of employees affected by an acquisition or merger decide to settle their internal disagreements about LPP seniority matters prior to bargaining with the carrier. *See also* n.12, *infra*.

to by mediation, "arbitration should be mandatory" (paragraph 8(a)). The arbitrator, then, was "to merge the respective seniority lists in a fair and equitable manner" (paragraph 8(i)), and he had authority to resolve the "issues remaining open between the parties" at that stage in the procedure, and to confirm agreements and stipulations made by the parties in negotiation and mediation (paragraph 8(f)). The arbitrator's award was "final and binding as to all flight deck operating crew members and shall be defended by the parties" to the agreement (paragraph 8(j)). Furthermore,

> All parties * * * shall in good faith seek its acceptance and its implementation by the Company in unchanged form. No change will be agreed to by any party with the Company unless all parties agree in writing to such change. Should agreement not be reached with the Company in its entirety, the parties will present and advocate the award in its entirety in any arbitration proceedings with the Company [pursuant to section 13(a) of the LPP's] to resolve seniority integration. Paragraph 13.

The arbitration. After unsuccessful intra-union negotiation and mediation on seniority integration, arbitration took place before Arbitrator Lewis M. Gill.[5] The hearing, fully participated in by the four union repre-

---

[5] Arbitrator Gill was named in the procedural agreement as the arbitrator ("The Arbitrator shall be Lewis Gill. In the event that he is unwilling or unable to serve for any reason, the Arbitrator shall be * * *, * * *, or * * *, to be chosen by lot" (paragraph 8(b)).). Clearly, he was the first choice of the parties to the arbitration, including Pan Am Engineers, and understandably so. Arbitrator Gill is experienced with airline seniority, having participated in integrating seniority and resolving seniority disputes in connection with, for example, the United-Capital, Bonanza-Pacific-West Coast (Air West), Alaska-Alaska Coastal, Allegheny-Mohawk, and Saturn-TIA consolidations. Neither Janus Group nor PAPF has raised a question as to his qualifications to decide the seniority dispute.

sentatives, lasted approximately 35 days and closed on January 14, 1981. At the hearing, Janus Group appeared twice to present its integration position. Following the hearing, Arbitrator Gill held 15 days of executive session with the union parties. Ultimately, the record contained over 4,700 transcript pages and hundreds of exhibits.

On March 12, 1981, Arbitrator Gill issued an award, "the culmination," he stated, "of an exceptionally lengthy series of proceedings * * *." [6] Three aspects of the award were particularly difficult to resolve, and created great dissention among the parties. They remain under attack before us.

The award: on crew complement and cross-bidding. In 1948, the Board required (under authority now exercised by the Federal Aviation Administration) that air carriers use a third cockpit crew member, along with two pilots, on all aircraft certified for more than 80,000 pounds maximum take-off weight. Two patterns of implementation of this decision developed in the industry. One group of carriers, including Pan American and National, used flight engineers as the third crewman; namely, an individual holding a flight engineer's certificate issued by the FAA and whose assigned duty was to assist the pilots in the mechanical operation of the airplane. The second group of carriers assigned pilots, with engineer certification, to the third seat. When jet aircraft appeared in the 1950's, ALPA took the position that the third crewman must be a pilot. FEIA opposed this, and controversy resulted at most airlines, many being struck by the unions.

---

[6] From beginning to end, implementation of the union's procedural agreement for seniority integration took a year, "a remarkably long time to carry out." Both statements by Arbitrator Gill, on the difficulty that the unions had in resolving the seniority question, were made in a 59-page opinion, dated May 11, 1981 (at 1-2), in which he "discusses the issues and sets forth the reasons for the decisions which are embodied in the Award" (*id.* at 1).

National decided to continue using flight engineers. Consequently, it continued to have two airmen groups, engineers and pilots. It maintained two independent seniority lists, and did not allow cross-bidding or displacement between the groups. Pan American decided to begin using pilots/engineers ("P.F.E.'s") as the third crewman. Its flight deck personnel, from then on, were combined on a single seniority list. P.F.E.'s were allowed to bid for pilot vacancies and bump back to engineer positions to avoid furlough. Since Pan American's former flight engineers did not qualify as pilots, the carrier agreed with Pan Am Engineers to treat them in a special way, for bidding purposes, as long as they worked for the carrier. Memorandum of Agreement dated May 13, 1963. These engineers (listed by name in Appendix A of the memorandum) had "the prior right as against flight crew members other than the [Appendix A] flight engineers * * * to bid for and occupy the third crew member position * * *."[7]

At the time of the instant seniority arbitration, Arbitrator Gill found that "unusual difficulty arises from the fact that the 'cross bidding' arrangements between the pilots and the engineers at the two airlines are wholly different" (Opinion at 8). Deciding "not to disturb the [premerger] cross-bidding situations * * *" (*id.* at 54), Arbitrator Gill set-up two integrated lists. One, called the "Pilot List," contained National pilots and all Pan American airmen; the other, the "Engineer List," contained National engineers and all Pan American airmen (Award at I). With such list arrangement, which in effect duplicated National's two-lists for pilots and engi-

[7] The May 13, 1963 company-union agreement was implemented further by separate agreement between the company and each Appendix A engineer. These private contracts provided that if Pan American took any action detrimental to the engineer's "prior right" to the third flight deck position, the claim against the company could be arbitrated (paragraph 4).

neers, and Pan American's single airman list, Arbitrator Gill then had cross-bidding be,

> As before on each airline. Pan Am airmen continue cross-bidding practices vis-a-vis each other, but Pan Am Pilots cannot bump National Engineers. National Pilots cannot bid Engineers positions, National Engineers cannot bid Pilot positions. National Engineers to have the same rights as Pan Am Appendix A Engineers against being displaced from Engineers seats by Pilots. Award at IV.C.

In so determining lists and bidding, Arbitrator Gill rejected strong objection by Pan Am Engineers that he had violated the May 13, 1963 crew complement agreement and exceeded his authority in the arbitration. The union argued, first, that Pan Am Appendix A engineers' prior right to the engineer seat ran against all other Pan American airmen and all National airmen, *including National flight engineers.*[8] Second, Pan Am Engineers asserted that the crew complement agreement gave Pan American P.F.E.'s *an unlimited right* to bid for engineer seats if they were not held by Appendix A engineers. The union argued, therefore, that Arbitrator Gill could not except National engineers from displacement by P.F.E.'s. Arbitrator Gill found that, by these contentions, Pan Am Engineers was simply trying "to impose that agreement on the National airmen against their will" ("Opinion at 54). Pan American airmen, in his judgment, "will continue to have the cross-bidding and bumping rights vis-a-vis each other (except for Appendix A engineers) which they have had before [under the May 13, 1963 agreement] * * *." But, he concluded, "that

---

[8] The award begins the engineer list by "[s]traight date of hire for all National Flight Engineers hired before February 22, 1964 and all PAA Flight Engineers hired prior to February 22, 1964 * * *" (at I.B. 1.). Pan Am Engineers insisted that the list must begin with Appendix A engineers regardless of their date of hire relative to that of National engineers.

Agreement *cannot be viewed as binding on the National airmen, who were not parties to it.*" *Id.* at 54-55 (emphasis added).

The award: on furloughees. "[O]ne of the most explosive of all the issues in the entire case," Arbitrator Gill found, concerned the furlough situation at Pan American (Opinion at 40). A few years before the merger, the carrier had converted most of its fleet from narrow-bodied 747's to secure "more seats with fewer planes" (*id.* at 7). Arbitrator Gill found that the effect on Pan American's flight deck personnel had been that "[a] great many crew members who were hired in 1966, 1967 and 1968 with the advent of the new 747's, were furloughed in the early 1970's as the phasing out of the 707's got underway, *and nearly 400 of them were still on furlough at the time of the merger in January 1980*" (*ibid.* (emphasis added)). There was "a head-on-clash" in the arbitration "over the relative equities as between large numbers of National airmen hired between 1968 and 1978 and actively employed at the time of the merger, and large numbers of these Pan Am furloughes with earlier dates of hire who still have recall rights but who brought no active jobs to the merger" (*id.* at 8). Had a proposal been made by the parties, or Janus Group, "which would estimate the *likely dates of recall* of the furloughees and the likely length of service of the active pilots at those dates," Arbitrator Gill would have "slot-[ted] the furloughes in[to the integrated lists] on that basis" (*id.* at 41). No such proposal was made, "[p]erhaps because of the difficulties in fashioning projections of that nature * * *" (*ibid.*).

Arbitrator Gill thus decided that the "realistic and fair solution" to furloughee seniority would be "to calculate the length of service of the furloughees *at the time of their recall*, and to slot them into the list by comparing their length of service with that of the active airmen *at that time* * * *" (Opinion at 41, 40). *See* Award at

I.A.6. and I.B.4.[9] To Pan Am Engineers' and Janus Group's "strong protests over what they termed this concept of 'floating length of service' for the furloughees," and its alleged illegality because "it does not provide a definite and final merged list at this point, but leaves the placement of the furloughees to be determined at future dates" (Opinion 41), Arbitrator Gill responded:

> This may well be a novel approach, but the problem itself is novel—there has not been any previous merger case called to my attention *where such massive numbers of furloughees, with such long periods of being off the property, were pitted against airmen from the other airline who brought current jobs to the merger.* Opinion at 40 (emphasis added).

He concluded that no persuasive argument had been made by the parties or Janus Group that the award's "time of recall" calculation of furloughee seniority "is unfair or otherwise improper" (*id.* at 41).

The award: on ratio method. Pan American's reliance on 747 aircraft, contrasted with National's use of smaller planes, also complicated construction of an integrated seniority list for pilots. Because of the timing of hiring pilots at the two airlines, Arbitrator Gill found that there was great disparity between the number of Pan American and National pilots who could reasonably expect to man the larger, and higher paying, 747 and 727 aircraft in the future. *See* Opinion at 15-22. National airmen hired after 1964, moreover, would be denied the prospects for advancement to larger aircraft that they could have expected, under ordinary circumstances, absent the merger. To cure the "substantial practical inequities" against the National pilots in this regard (*id.* at 22), Arbitrator Gill

---

[9] Exception was made for about 34 furloughed Pan American pilots who had received notice of recall before January 18, 1980. Their seniority was calculated like that of pilots who were working on the merger date. Award at I.A. 6.

determined to construct the middle part of the pilot list by a ratio method. Above and below this section, pilots were integrated by date of hire ("DOH") and/or length of service—*i.e.*, DOH with furlough time deducted ("LOS"). Award at I.A.[10]

Pan Am Pilots favored a DOH-LOS list exclusively, and Arbitrator Gill's use of a ratio method, even for part of the list, "brought some extraordinarily bitter complaints * * *" (Opinion at 24). Nonetheless, Arbitrator Gill concluded that he had been given "the very broad direction," under the union parties' March 19, 1980 procedural agreement setting forth the guidelines for the arbitration, that "it shall be the duty of the Arbitrator to merge the respective seniority lists in a fair and *equitable manner*" (Opinion at 10). *See* March 19, 1980, Agreement at paragraph 8(i). Moreover, while ALPA's guidelines for construction of merged lists were not binding in this case, FEIA also being involved, Arbitrator Gill found them "entitled to considerable weight, since a large majority of the airmen involved in the case *are* ALPA members and since the Flight Engineers do not have any similar set of guidelines to be compared with those in the ALPA Manual" (Opinion at 10). Arbitrator Gill held it "fair to summarize" the ALPA guidelines, "the relevant portions of which have been unchanged at least since December 1971" (*ibid.*), as requiring,

> [C]onsideration first to a DOH list, then (if 'acceptable accommodation' of the equities is not accomplished by such a list) to look at an LOS list, then (if 'satisfactory accommodation' of the equities is still not accomplished) to attempt to accommodate the remaining inequities through temporary restrictions or conditions, and finally (if a 'satisfactory ac-

---

[10] Pilots hired before February 22, 1964, were integrated by date of hire. Length of service criteria were used for pilots hired after that date.

> commodation' is still not accomplished) to the 'deviation' from the DOH and LOS manner of constructing the list in order to reach a 'fair and equitable solution.' *This 'deviation' has often taken the form of a ratio arrangement for all or part of the merged list.* Opinion at 12 (emphasis added).

See ALPA "Merger Policies" Manual at paragraph 5, steps I-IV. Indeed, as Arbitrator Gill emphasized, "departures from length of service * * * are no rarity in * * * merger cases;" and he noted his use of a ratio in the *Bonanza-Pacific-West Coast (Air West)* merger and his comment there that "[s]peaking for myself, I would have favored using straight length of service as the basis for merging the lists *if there were no substantial practical inequities which could not be covered by special protective provision*" (quoted in Opinion at 38 (emphasis in original)). As for the instant merger, Arbitrator Gill reiterated that,

> That is still my view. In this case, however, as in * * * [*Air West*], I have concluded that there *are* some 'substantial practical inequities' in unrestricted operation of straight length of service which * * * could not feasibly be cured in workable and readily administrable fashion by special protective provision [, the last alternative to ratio method in ALPA guidelines]. Opinion at 38.

Thus, with "departures from length of service * * * not uncommon," and "expressly sanctioned by ALPA policy where they are *deemed necessary to provide a 'fair and equitable solution,'* " Arbitrator Gill turned aside Pan Am Pilots' opposition to a ratio method, and used it to integrate part of the Pan American-National pilot list.

The aftermath. All of the parties to the arbitration accepted the Gill award as the final and binding seniority proposal to submit to Pan American for implementation, except Pan Am Engineers. Pan Am Pilots, National

Pilots, and National Engineers did so despite their dissatisfaction with parts of the award, which clearly represented compromise solutions to four-way disputes on integration issues. ("There are parts of * * * [the award] that the * * * [Pan Am Pilots] is not pleased with" (August 7, 1981, Opposition at 10); "The National Pilots also have most serious 'reservations' concerning certain aspects of the Gill Award * * *" (May 12, 1981, Answer at 1).).[11] Pan Am Engineers continued to argue about the award's treatment of crew complement, cross-bidding, and furloughee issues. The union independently, and contrary to paragraph 13 of the March 19, 1980 seniority procedural agreement, *supra*, asserted to the company that bargaining must resume on these issues and, if necessary, be resolved by a second arbitration, this time conducted pursuant to section 13 of the LPP's.

Pan Am Engineers' position has been expressed to us, not directly by a petition to set aside the award, but in the union's opposition to National Engineers' motion to confirm and enforce the award. According to the union, Arbitrator Gill acted beyond the scope of his authority by integrating the seniority lists in a manner which assertedly abrogated Pan American's own premerger employees' private contract rights. After Pan American agreed to implement the seniority lists, Pan Am Engineers filed an additional pleading asserting that the carrier had no authority to put the award into effect because a dispute still existed with the union group under section 3 of the LPP's.

Two groups, moreover, have asked us to set aside the award. Janus Group argues for this because, assertedly, "the interests of the members of the Janus Group were

---

[11] ALPA, International also filed with the Board in support of the award. ("[T]he law necessarily affords the employees' representatives a wide range of discretion * * * to engage in flexible and rational compromise * * *" (August 7, 1981, Answer at 5).).

not adequately considered [in the Gill arbitration] and * * * the integration award eventually issued by Arbitrator Gill was not 'fair and equitable' within the meaning of the labor protective *process*." Janus Group's asserted remedy is a new arbitration in which it "is granted *full party status* * * *." Petition at 2 (emphasis added).

PAPF, the group of Pan Am pilots formed in response to the award, argues that it must be set aside because a ratio method was used to integrate some pilot seniority. PAPF insists, as did Pan Am Pilots throughout the arbitration (discussed above), that a "time served" method, either DOH or LOS, is the only fair and equitable basis for integration; a ratio method is, assertedly, "inconsistent with the LPP's" (Petition at 2 and 24). The group asks us to require "all the parties, including RAPF and Janus Group, to renegotiate the award or to order such other relief to ensure that the final integrated seniority is fair * * * [and] equitable * * *" (*id.* at 24-25).

Holding itself apart from all of the foregoing controversy, Pan American accepted the Gill award on June 26, 1981, and agreed to implement the award entirely unchanged.[12]

---

[12] In accepting and implementing the award, Pan American stated that it had "determined to waive its right to an arbitration under Section 13(a) of the [LPP's] * * *." In other words, the carrier simply decided to forego bargaining with the employees' representatives about changes in the award which entailed the possibility that arbitration would be required with the representatives to settle bargaining disputes (July 2, 1981, Statement at 1). Pan American further stated that "[c]onsequently, the fair and equitable integration of flight deck operating crew members seniority has now been accomplished pursuant to Section 13(b) of the [LPP's] * * *" (*id.* at 2). Consistent with our comments *supra*, at n.4, the company is mistaken in the latter view. Since Pan American accepted, completely, the employees' seniority proposal, there was no dispute which required resolution under the procedure of sections 13(a) or 13(b).

Conclusions. We shall dismiss National Engineers' (or the "flight engineers formerly in the employ of National's") motion to confirm and enforce Arbitrator Gill's award. As Pan American has given full force and effect to the award, the request for our intervention is now moot.

The carrier's action is wholly consistent with our long-held, and judicially approved, view that "absent a showing of bad faith, the adoption by a carrier of an integrated seniority list proposed by the collective bargaining representatives of the employees involved amounts to the carrier having made 'provisions * * * for the integration of seniority lists in a fair and equitable manner' within the meaning of section 3 of the Board's labor protective provisions." [13] It follows, therefore, that we also dismiss Janus Group's and PAPF's petitions to set aside the award. Neither group, both formed to forward the views of some Pan American furloughees and pilots, respectively, who were otherwise represented in the intra-union arbitration by Pan Am Engineers and Pan Am Pilots, has shown that these union representatives breached their duty of fair representation. The record before us amply demonstrates that all union parties vigorously advocated positions on seniority integration advantages to their members. Janus Group, in addition, appeared in the arbitration to express, directly to Arbitrator Gill, its position for furloughees. To the extent that some of the parties failed to prevail in the substance of their views, and hence occasioned disappointment for certain furloughees and pilots, that is not grounds for our review of the intrinsic nature of the integration system established by the award. It is well-settled that the Board properly "decline[s] to review and to enter judgment on the merits of * * * [union representatives'] negotiated resolution of

---

[13] *Delta-Northeast Merger Case*, Order 73-1-24 at 5, *aff'd Northeast Master Executive Council* v. *CAB*, 506 F.2d 97 (D.C. Cir. 1974), *cert. denied*, 419 U.S. 1110.

* * * [an internal union] seniority dispute arising out of a merger" if satisfied "that the resolution was reached in a fair and equitable manner." [14] Here, the record shows that the labor parties adopted fair and equitable procedures—four-way negotiation, mediation, and final and binding arbitration—to resolve their differences on merged seniority; and that the procedures were faithfully carried out—even to the unanimous selection of an eminent arbitrator in airline seniority matters.

What remains is Janus Group's charge that it was entitled to "full party status" in the seniority arbitration. We have, twice before in this merger case, rejected the identical claim (Orders 77-12-163/164/165 and 81-4-141). It is perfectly clear now that Janus Group, on its own and through union representation, fully participated in integrating seniority within the meaning of the LPP's. They were accorded an opportunity to present a statement of position and a closing argument in the arbitration. Their interests were also represented by the Pan Am Pilots and Pan Am Engineers at all stages of the arbitration.

What remains of PAPF's petition is the claim that "length of service" must be used, exclusively, to integrate pilot seniority under LPP section 3. The Board has long recognized that seniority lists may properly be predicted on factors other than length of service (*Delta-Northeast Merger Case, supra* Order 73-1-24 at 4):

> [T]he integration of seniority lists based on factors other than, or in addition to, date of hire or length of service is by no means uncommon: See, *e.g., Delta-C&S Seniority List*, 29 C.A.B. 1347 (1959), *aff'd sub nom. Outland* v. *CAB*, 284 F.2d 224 (D.C. Cir. 1960). Nor can we conclude that the use of factors in addition to date of hire or length of service is so unfair as to require that we adopt a general rule

---

[14] *Kingston and Foster, supra* Order 79-11-53 at 15.

> forbidding carriers from accepting seniority lists formulated on the basis of such additional factors. See, *e.g.*, *North Atlantic Route Transfer Case* [12 C.A.B. 124 (1950)].

As the U.S. Court of Appeals for the District of Columbia Circuit said in affirming that judgment, the integration "problem has no facile solution * * *," and the Board's action "in refusing to look behind the freely negotiated list [, which used factors other than length of service,] * * * [is] wholly consistent with * * * [the Board's] obligation under the Act" (*Northeast-MEC* v. *CAB*, *supra* 506 F.2d at 104-105). We are satisfied, in the circumstances of this merger, that there were no facile answers available to Arbitrator Gill to resolve the myriad of complex and conflicting problems associated with pilot seniority integration. It was well within Arbitrator Gill's prerogative to address those problems through use of a ratio methodology in compiling a portion of the seniority lists.[15]

---

[15] In challenging the award, PAPF assails the arbitrator's projections of the size of the merged carrier's fleet as of January 1, 1986. PAPF contends that these projections, which allegedly are inaccurate in light of certain events transpiring after the close of the record in the arbitration proceeding, warrant the overturn of the integrated list. Such assertion provides no basis for our intervention. As the Board has stated in similar circumstances (*Bonanza-Pacific-West Coast Merger Case*, Order 72-11-79 at 2):

> [W]e have previously made plain our intention that an arbitrator's decision rendered pursuant to § 13 be final and binding subject to only very limited exceptions * * *. We do not consider the existence of a mutual mistake in forecasting future facts to be one of these exceptions. Arbitration awards under § 13 may often hinge on forecast facts. While those forecasts may later prove erroneous, we think it of overriding importance that arbitration proceedings, like any other litigation, be capable of prompt and final resolution.

That reasoning applies equally in this proceeding.

It is noteworthy, moreover, that Pan Am Pilots—the authorized bargaining representative of the pilots seniority list at Pan American—supports the Gill award and opposes the petitions filed by a few of its constituents through the Janus Group and PAPF. As Pan Am Pilots recognize, it is virtually impossible to satisfy everyone—or sometimes anyone—in a seniority integration case. Arbitrator Gill was faced with totally opposed positions for the integration of the seniority lists, and the parties were fully permitted to develop their cases supporting their separate positions in a record involving over 4,700 transcript pages and hundreds of exhibits. In the end the arbitrator did what most arbitrators do—he picked parts of the different positions and made compromises to arrive at what he believed was an equitable result. There is no way, given the sharply divergent and contested positions of the parties, that the arbitrator could ever reach a result that was fully acceptable to all parties—to say nothing of the individual pilots and flight engineers whose interests were represented in the proceeding. That is an inevitable result of arbitration. The fact that dissatisfaction remains is no basis for requiring another seniority integration.

Finally, there is no merit to the contentions raised by Pan Am Engineers. We reject the argument that there has been no "agreement" between the carrier and labor representatives within the meaning of section 3 of the LPP's in view of Pan Am Engineers' present opposition to the Gill Award. As discussed, the labor representatives for all flight deck personnel—including Pan Am Engineers—entered into an agreement establishing a series of procedures to accomplish the integration of the seniority of the cockpit crew members of Pan American and National. That agreement made the award of the arbitrator final and binding upon its signatories and required them to seek implementation of the award with the company. The arbitration was held and the decision was sub-

mitted to Pan American and accepted. The carrier's acceptance of the labor representatives' list satisfies the obligations imposed by section 3. Having bound itself to follow the course for integrating seniority lists set forth in the inter-union agreement, Pan Am Engineers cannot force a new arbitration simply because it is dissatisfied with the results of the prior one.

We also reject the argument that Arbitrator Gill exceeded the authority given him in the union parties' March 19, 1980 procedural agreement. The arbitrator's mandate was broadly written "to merge the respective seniority lists in a fair and equitable manner" (Agreement at paragraph 8(i)). The assertion that Arbitrator Gill exceeded his authority, moreover, is predicated on the notion that flight engineers for premerged Pan American acquired vested seniority rights through contracts with Pan American, and that the arbitrator was without authority to interfere with those rights. To the contrary, it has long been recognized that private contract rights must, if necessary, yield to a fair and equitable integration of seniority lists pursuant to Board imposed LPP's. *See Kent* v. *CAB*, 204 F.2d 263, 266 (2d Cir. 1953), *cert. denied*, 346 U.S. 826; *American Airlines* v. *CAB*, 445 F.2d 891 (2d Cir. 1971), *cert. denied*, 404 U.S. 1015 (1972); *Sanders* v. *ALPA*, 361 F. Supp. 670, 672 (S.D.N.Y. 1973). National pilots and engineers, moreover, were not parties to, or bound by, the agreements between premerged Pan American and its premerger airmen.

Pan Am Engineers also urges that Arbitrator Gill exceeded his authority when he determined that those Pan Am airmen on furlough on the effective date of the merger will be slotted into the integrated seniority lists at such time as they are recalled to active service, with their seniority positions to be determined by their relative length of service at the time of their recall. The vice said to render this provision unlawful "is that furloughed

Pan American airmen remain unintegrated * * *" (May 12, 1981, Answer at 27). We disagree. The arbitrator has made full provision for the integration of Pan Am furloughees on the seniority lists. It is merely that the *method* of integration calls for a future event to trigger the *calculation* of their positions on the integrated lists.

In sum, we conclude that Pan American has integrated flight deck personnel seniority in compliance with the labor protective provisions. Our responsibility is confined to examining whether the integration was fairly and equitable conducted. The answer is affirmative.

ACCORDINGLY, we dismiss the motion of flight engineers formerly in the employ of National for confirmation and enforcement of arbitration award, and the petitions of Janus Group and Pan American Pilots Fighting to set aside arbitration award filed in the *Pan American-Acquisition Of Control Of, And Merger With National* case, Docket 33283.

By the Civil Aeronautics Board:

PHYLLIS T. KAYLOR
Secretary

(SEAL)

All Members concurred.

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Index No. 84 Civ. ———

JOHN C. COOK, *et al.*;

Plaintiffs

—against—

PAN AMERICAN WORLD AIRWAYS, INC.; AIR LINE PILOTS ASSOCIATION, INTERNATIONAL; AIR LINE PILOTS ASSOCIATION, PAN AM CHAPTER; FLIGHT ENGINEERS INTERNATIONAL ASSOCIATION; FLIGHT ENGINEERS INTERNATIONAL ASSOCIATION, PAN AM CHAPTER;

Defendants.

JURY TRIAL DEMANDED

COMPLAINT

John C. Cook, *et al.*, Plaintiffs, by and through their attorneys, Butler & Binion, file this Complaint against Pan American World Airways, Inc. ("Pan Am"); Air Line Pilots Association, International ("ALPA"); Air Line Pilots Association, Pan Am Chapter ("ALPA-PAA"); Flight Enginers International Association ("FEIA"); and Flight Enginers International Association, Pan Am Chapter ("FEIA-PAA"). In support of this Complaint, Plaintiffs will show the Court the following:

I.

PARTIES

1. Appendices A and B, attached hereto and made a part hereof, constitute a list of *439* Plaintiffs compiled as of the date of filing. Additional Plaintiffs are expected to "opt in" to this action.

2. Defendant Pan Am has continuously been and is now a New York corporation. It has no registered agent listed with the office of the Secretary of State for the State of New York. Therefore, it may be served with process by serving an officer of said corporation at its headquarters offices, located at the Pan Am Building, 200 Park Avenue, New York, New York, 10166. Pan Am is doing business in and has substantial contacts with the State of New York and City of New York, where it is engaged in the aviation business and employs more than twenty employees. Defendant Pan Am has continuously been and is now an employer engaged in an industry affecting commerce within the meaning of Sections 11(b), (g) and (h) of the ADEA, 29 U.S.C. §§ 630(b), (g) and (h).

3. Defendant ALPA has continuously been and is now an unincorporated association which represents pilots employed by Pan Am and other airlines concerning terms and conditions of employment. Defendant ALPA is made up of "chapters," each of which represents the pilots employed by a particular airline. Defendant ALPA may be served with process by serving the President, Secretary/Treasurer, or a business representative of said association at its offices located at 1625 Massachusetts Ave., N.W. Washington, D.C. 20036. Defendant ALPA has substantial contacts with the State of New York and City of New York. Defendant ALPA has continuously been and is now a labor organization engaged in an industry affecting commerce within the meaning of Sections 11(d) and (e) of the ADEA, 29 U.S.C. §§ 630(d) and (e). Defendant ALPA is subject to and must comply with the Railway Labor Act, 45 U.S.C. § 151 *et seq.*, made applicable to the aviation business by 45 U.S.C. § 181, *et seq.*

4. Defendant ALPA-PAA has continuously been and is now an unincorporated association which represents pilots employed by Pan Am concerning terms and conditions of employment, and is a chapter of Defendant

ALPA. It may be served with process by serving the President, Secretary/Treasurer, or a business representative of said association at its offices located at 200 Park Avenue, New York, New York, 10166. Defendant ALPA-PAA has continuously been and is now a labor organization engaged in an industry affecting commerce within the meaning of Sections 11(d) and (e) of the ADEA, 29 U.S.C. §§ 630(d) and (e). Defendant ALPA is subject to and must comply with the Railway Labor Act, 45 U.S.C. § 151 *et seq.*, made applicable to the aviation business by 45 U.S.C. § 181, *et seq.*

5. Defendant FEIA has continuously been and is now an unincorporated association which represents flight engineers employed by Pan Am and other airlines concerning terms and conditions of employment. Defendant FEIA is made up of "chapters," each of which represents the flight engineers employed by a particular airline. Defendant FEIA may be served with process by serving the President, Secretary/Treasurer, or a business representative of said association at its offices located at 905 - 16th St., N.W. Washington, D.C. 20006. Defendant FEIA has continuously been and is now a labor organization engaged in an industry affecting commerce within the meaning of Sections 11(d) and (e) of the ADEA, 29 U.S.C. §§ 630(d) and (e).

6. Defendant FEIA-PAA has continuously been and is now an unincorporated association which represents flight engineers employed by Pan Am concerning terms and conditions of employment, and is a chapter of Defendant FEIA. It may be served with process by serving the President, Secretary/Treasurer, or a business representative of said association at its offices located at Roosevelt Field, Garden City, N.Y. Defendant FEIA-PAA has continuously been and is now a labor organization engaged in an industry affecting commerce within the meaning of Sections 11(d) and (e) of the ADEA, 29 U.S.C. §§ 630(d) and (e).

II.

JURISDICTION AND VENUE

7. Jurisdiction of this Court is invoked pursuant to a) 28 U.S.C. §§ 451 and 1343; b) 28 U.S.C. § 1337; and c) the principle of pendant jurisdiction. This is an action authorized and instituted pursuant to a) Section 7(c), 29 U.S.C. § 626(c), of the Age Discrimination in Employment Act of 1967, as amended ("ADEA"), 29 U.S.C. § 621, *et seq.*, which incorporates by reference Sections 16(b) and 17, 29 U.S.C. §§ 216(b) and 217, of the Fair Labor Standards Act of 1938, as amended, 29 U.S.C. § 201 *et seq.*; b) the Railway Labor Act, 45 U.S.C. § 151, *et seq.*, as made applicable to the above-named Defendants by 45 U.S.C. § 181, *et seq.*, and c) the New York Human Rights Law, N.Y. Exec. Law § 290, *et seq.* (McKinney 1983).

8. The unlawful employment practices alleged below have been and are now being committed within the State of New York, in the Southern District. Venue in this Court is thus proper under 28 U.S.C. §§ 1391(b) and 1392(a).

III.

FACTUAL ALLEGATIONS

9. Plaintiffs John C. Cook, *et al.*, are all over 40 years of age, are and/or have been employed as Pilot-Flight Engineers by Defendant Pan Am, and are members and/or apprentice members of the Defendants ALPA, ALPA-PAA, FEIA, and FEIA-PAA. All of the Plaintiffs whose names are listed in Appendix A filed charges, containing some or all of the allegations stated herein, in one or more of the following federal and state equal employment offices: a) the New York Regional Office of the U.S. Equal Employment Opportunity Commission;[1] b) the Miami District Office of the U.S. Equal Employment Opportunity

[1] 90 Church Street, Room 1501, New York, New York 10007.

Commission;[2] c) the San Joe Area Office of the U.S. Equal Employment Opportunity Commission;[3] d) the New Jersey Division on Civil Rights;[4] e) the New York State Division of Human Rights;[5] and f) the California Department of Fair Employment and Housing.[6] The above-referenced charges were filed between the dates of April 12, 1983, and September 2, 1983. This civil action is thus being commenced more than sixty days after the filing of all of the above-referenced charges, in compliance with the requirements in Section 7(d) of the ADEA, 29 U.S.C. § 626(d). The Plaintiffs listed in Appendix B did not file charges in federal or state equal employment offices, but are similarly situated individuals, with similar or identical claims against the Defendants, and are thus properly joined as Plaintiffs. This Complaint will be amended by the addition to Appendix B of other similarly situated Plaintiffs "opting in" to the action.

10. In 1980, Defendant Pan Am merged with National Airlines ("National"). Defendants ALPA and FEIA, through their chapters representing Pan Am and National pilots and flight engineers (i.e. chapters now consolidated as Defendants ALPA-PAA and FEIA-PAA), submitted to an arbitrator the integration of the pilot and flight engineer seniority lists of the to-be-merged companies. Defendant Pan Am expressly reserved the right to accept or reject the resulting arbitration award, which was issued on March 12, 1981. However, Defendant Pan Am subsequently accepted and implemented the Award in its entirety.

---

[2] DuPont Plaza Center, Suite 414, 300 Biscayne Boulevard Way, Miami, Florida 33131.

[3] Crocker Plaza Building, 84 West Santa Clara, San Jose, California 95113.

[4] 180 University Avenue, Newark, New Jersey.

[5] 270 Broadway, New York, New York.

[6] 322 W. First Street, Los Angeles, California 90012.

11. The pilot seniority list resulting from the arbitration award was first implemented on a system-wide basis on March 28, 1983, has been implemented continuously up until the present time, and will continue indefinitely to be implemented, by Defendant Pan Am with the active support and/or acquiescence of Defendants ALPA, ALPA-PAA, FEIA, and FEIA-PAA. The major characteristics of Pan Am's current pilot seniority system are as follows.

First, there are three cockpit positions on Pan Am's aircraft: two are pilot positions (Captain and First Officer), the third is the less rewarding and less lucrative Flight Engineer position. Under the current Pan Am pilots seniority system, pilots who worked for National before the merger of Pan Am and National may not be "bumped down" to the Flight Engineer position. Pilots who worked for Pan Am before the merger may be so demoted.

Second, rather than merging the pilot seniority lists of Pan Am and National such that the seniority position of each pilot would depend on his amount of credited experience, the current pilot seniority list uses a ratio to insert large numbers of former National pilots under age 40 ahead of older and more experienced Pan Am pilots over the age of 40.

Third, all pilot furloughs (i.e., layoffs) before 1986 are to proceed according to a one-for-one formula, whereby equal numbers of former Pan Am and former National pilots are furloughed, regardless of relative credited experience or relative position on the seniority list.

12. On March 28, 1983, Defendant Pan Am caused to be issued assignments ("assignments") to its flight deck crew personnel, based on the pilot and flight engineer seniority system.

13. On June 15, 1983, Defendant Pan Am caused to be furloughed, under the above-described pilot seniority sys-

tem, three of the Plaintiffs named in Appendix A: Robert L. Jarboe, Clifford E. Cool, and Richard V. Paul.

IV.

LEGAL CAUSES OF ACTION

14. By using and adopting, and by indefinitely continuing to use and adopt, the above-described seniority system in making employment decisions, Defendant Pan Am has limited, segregated and classified the Plaintiffs so as to deprive or tend to deprive them of employment opportunities and otherwise adversely affect Plaintiffs' status as employees, because of Plaintiffs' age, and will continue to do so, in willful and continuous violation of Section 4(a) of the ADEA, 29 U.S.C. § 623(a).

15. By using and adopting, and by indefinitely continuing to use and adopt, the above-described seniority system in making employment decisions, Defendant Pan has discriminated and will continue to discriminate against Plaintiffs in compensation and terms, conditions and privileges of employment because of age, in willful and continuous violation of Section 296 of the New York Human Rights Law, N.Y. Exec. Law § 296.

16. By actively supporting and/or acquiescing in, and by indefinitely continuing to actively support and/or acquiesce in, the above-described seniority system, Defendants ALPA, ALPA-PAA, FEIA, and FEIA-PAA have limited, segregated, and classified their membership so as to deprive or tend to deprive the Plaintiffs of employment opportunities, limit Plaintiffs' employment opportunities, and other adversely affect the Plaintiffs' status as employees, and will continue to do so, on the basis of their age, in willful and continuous violation of Section 4(c) of the ADEA, 29 U.S.C. § 623(c), and Section 296 of the New York Human Rights Law, N.Y. Exec. Law § 296.

17. By actively supporting and/or acquiescing in, and by indefinitely continuing the support and/or acquisece in, the above-described seniority system, Defendants ALPA, ALPA-PAA, FEIA, and FEIA-PAA have discriminated and will continue to discriminate against Plaintiffs because of age, in willful and continuous violation of Section 296 of the New York Human Rights Law, N.Y. Exec. Law § 296.

18. By actively supporting and/or acquiescing in, and by indefinitely continuing the support and/or acquiesce in, the policies and practices complained of in the above paragraphs, the representation of Plaintiffs' interests by Defendants LPA, ALPA-PAA, FEIA, and FEIA-PAA has been and will continue to be arbitrary, discriminatory and/or in bad faith. Defendants have thereby breached their duty under the Railway Labor Act, 29 U.S.C. § 151 *et seq.*, to fairly represent the interests of the Plaintiffs.

PRAYER FOR RELIEF

WHEREOF, Plaintiffs respectfully request that this Court:

A. Grant preliminary and permanent injunctions prohibiting defendants Pan Am, ALPA, ALPA-PAA, FEIA, and FEIA-PAA from taking or causing to be taken any actions based on the illegal seniority system described herein, and correcting all past actions taken on the basis thereof, and further ordering Defendants to construct and implement a seniority system which eradicates the effects of the past and present unlawful employment practices described herein.

B. Order Defendants Pan Am, ALPA, ALPA-PAA, FEIA, and FEIA-PAA to make Plaintiffs whole by an award of damages.

C. Order defendants Pan Am, ALPA ALPA-FEIA, FEIA, and FEIA-PAA to pay liquidated damages to Plaintiffs, in light of Defendants' willful violation of the law.

D. Order Defendants to pay Plaintiffs' attorneys' fees and costs, including court costs.

E. Grant such other and further relief as this Court may deem just and proper.

Respectfully submitted,

BUTLER & BINION

/s/ Jeffrey C. Londa
JEFFREY C. LONDA
1600 Allied Bank Plaza
Houston, Texas 77002
(713) 237-3270

ROBERT E. COHN
KEVIN F. FLYNN
1747 Pennsylvania Ave., N.W.
Suite 900
Washington, D.C. 20006
(202) 466-6900
Counsel for Plaintiffs

Of Counsel:

/s/ Jeffrey Bernbach
JEFFREY BERNBACH
521 Fifth Avenue
New York, New York 10175
(212) 687-9730

JURY TRIAL

Plaintiffs request a jury trial on all questions of fact raised by their Complaint.

/s/ Jeffrey C. Londa
JEFFREY C. LONDA

Dated: March , 1984

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Index No. 84 Civ. ———

JOHN C. COOK, *et al.*;

Plaintiffs

—against—

PAN AMERICAN WORLD AIRWAYS, INC.; AIR LINE PILOTS ASSOCIATION, INTERNATIONAL; AIR LINE PILOTS ASSOCIATION, PAN AM CHAPTER; FLIGHT ENGINEERS INTERNATIONAL ASSOCIATION; FLIGHT ENGINEERS INTERNATIONAL ASSOCIATION, PAN AM CHAPTER;

Defendants.

VERIFICATION OF COMPLAINT

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

JOHN C. COOK, being duly sworn, deposes and says:

1. I am one of the Plaintiffs in the above action.

2. The facts pleaded in the foregoing Complaint are true and correct to the best of my knowledge, information and belief.

/s/ John C. Cook
(Signature of Affiant)
JOHN C. COOK

Sworn to before me this
7th day of March, 1984

/s/ Linda L. Matoli
Notary Public, State of New York

APPENDIX C

AFFIDAVIT OF MR. HAROLD M. GAY, SR.

THE STATE OF PENNSYLVANIA)
)
COUNTY OF NORTHAMPTON)

BEFORE ME, the undersigned authority, on this day personally appeared Harold M. Gay, Jr. who under oath did state the following:

1. My name is Harold M. Gay, Jr. I am above the age of twenty-one years and fully competent to make this affidavit.

2. I am a Pre-Merger Pan American Pilot Representative on the Gill Award Disputes Resolution Committee, representing pilots who were employed by Pan American World Airways, Inc. ("Pan Am") before the merger of Pan Am and National Airlines ("National"). I have served in this position since September 7, 1983.

3. I have been employed by Pan Am as a Pilot since December 20, 1965. I am a member of the Air Line Pilots Association ("ALPA").

4. I am presently 42 years of age. I was born on January 31, 1942. I have read Plaintiffs' Complaint dated March 7, 1984. I am familiar with the pilot seniority list referred to in the Complaint and with events concerning its construction and implementation.

5. In 1980, Pan Am merged with National. ALPA and the Flight Engineer International Association ("FEIA"), through their chapters respectively representing Pan Am and National pilots and flight engineers, submitted to an arbitrator the decision as to how to integrate the pilot and flight engineer seniority lists of the to-be-merged companies. Pan Am expressly reserved the right to accept or reject the resulting arbitration award of arbitra-

tor Lewis M. Gill ("Gill award"). The Gill award was issued on March 12, 1981. On June 26, 1981, Pan Am voluntarily accepted the Gill award in its entirety.

6. In or about September 1981, Pan Am posted the integrated pilot seniority list, but stated that such list was "tentative" and that pilots could submit protests to Pan Am concerning their seniority position for an unspecified period following the posting of the tentative list. The "final" pilot seniority list was issued in or about March 1982.

7. On or about April 14, 1981, I attended a meeting of the ALPA Council #6, Pan American Chapter ("PAA") to which all ALPA-PAA members were invited. At that meeting, ALPA representatives assured me and the other members in attendance that we would not suffer economic or career damage as a result of the merged pilot seniority system. The ALPA representatives stated that any disadvantage which we could conceive of suffering because of the sequence of pilots on the seniority list would be mitigated by other "conditions and restrictions" contained in the pilot seniority system which would allegedly protect pre-merger Pan Am pilots.

8. Before the merger, Pan Am's fleet consisted of the Boeing 747 ("B-47"), Lockheed 1011 ("L-1011") and Boeing 727 ("B-727"). National's fleet consisted of the DC-10 and B-727. The B-727, L-1011 and DC-10 are "wide-bodied" aircraft. Pay for piloting such aircraft is more than that for piloting narrow-bodied aircraft. Under the terms of the pilot seniority system, the pre-merger assignments of Pan Am airmen on the B-747 and L-1011 and former National airmen on the DC-10 were to be preserved until January 1, 1986. A "fence" was thus constructed which prevented Pan Am airmen from obtaining assignments on the DC-10 and former National airmen from obtaining assignments on the B-747 and L-1011. The "fence" was structured so that during the

pre-1986 "freeze" period, the members of the respective pilot groups would receive the same intra-group promotions and demotions as they would have absent the merger. Under the terms of the pilot seniority system, this "fence" would be crossed and the "freeze" ended only if Pan Am were to sell, or withdraw from service, aircraft which had belonged solely to either Pan Am or National before the merger, *i.e.*, the B-747, L-1011 or DC-10. Pan Am's sale or withdrawal of any of the above aircraft would trigger the "conditions and restrictions" contained in the pilot seniority system, which were designed to permit limited crossing of the "fence" in the event of such sale or withdrawal.

9. Between the dates of December 12 and 31, 1981, Pan Am posted a "proffer," *i.e.*, a roster of vacancies, listed by aircraft, position and base station, on which crew members could bid for reassignment. Positions based on the bids received during that proffer were awarded on January 27, 1982. Between the time of its acceptance of the Gill award on June 26, 1981, and its posting of a proffer on December 12-31, 1981, Pan Am had not sold or withdrawn any of its B-747, L-1011 or DC-10 aircraft. Consequently, no former National airmen "crossed over" from equipment formerly in the fleet of National to assume the jobs of Pan Am airmen. Thus, under that proffer, no Pan Am airmen over age 40 were demoted in favor of former National airmen under age 40. The "fence" between the assignments of Pan Am and former National airmen was preserved.

10. Pan Am's three subsequent proffers had no disadvantageous impact on the assignments of any Pan Am airmen *vis-a-vis* former National airmen, and hence had no such impact on any Pan Am airmen over age 40, because Pan Am had not sold or withdrawn any aircraft which had belonged solely to either Pan Am or National before the merger. Thus, the "fence" between Pan Am and former National assignments was preserved from the

time of Pan Am's acceptance of the Gill award through its issuance of four proffers.

11. As of February 26, 1983, Pan Am had decided to withdraw from service two (2) B-747s and three (3) L-1011s; consequently, between the dates of February 26 and March 17, 1983, Pan Am issued a proffer to redistribute pilot assignments. On March 28, 1983, vacancies were awarded under the pilot seniority system pursuant to the proffer issued between February 26 and March 17, 1983. Pan Am's withdrawal of the B-747s and the L-1011s triggered the "conditions and restrictions" under the pilot seniority system. This resulted in extensive cross-overs of former National airmen to equipment formerly flown only by Pan Am airmen, and had a direct and indirect discriminatory impact on Pan Am pilots over age 40 throughout the seniority list. This was the first time that the Pan Am pilot seniority list functioned to the disadvantage of Pan Am pilots over age 40 and the advantage of former National pilots under age 40.

12. On information and belief, the ward of March 28, 1983 had the following impact on Pan Am pilots over the age of 40:

(a) Approximately one hundred (100) former National pilots under age 40 were given Captain or First Officer positions superior to those of several hundred Pan Am pilots over the age of 40 with greater credited experience.

(b) Of those one hundred (100) former National pilots under age 40, approximately sixteen (16) were given First Officer positions on wide-bodied aircraft, and approximately six (6) were given Captain positions, superior to those of several hundred Pan Am pilots over age 40 with greater credited experience.

(c) Three (3) Pan Am pilots (Richard Jarboe, Clifford Cool and Richard Paul), who were all over age 40 and had over 16 years of credited experience

as of March 28, 1983, lost their jobs on June 15, 1983 pursuant to the terms of the pilot seniority system. Over one hundred (100) former National pilots under age 40 and with less credited experience than Messrs. Jarboe, Cool and Paul remained employed by Pan Am.

(d) In hundreds of other instances, Pan Am pilots over age 40 received (and continue to receive) assignments inferior to those of former National pilots who are younger and have less credited experience than their Pan Am counterparts.

13. In or about November 1983, Pan Am decided to sell fifteen (15) and withdraw from service one (1) DC-10 aircraft, resulting in further cross-overs of former National airmen under age 40 into positions previously held by Pan Am pilots over age 40. On or about February 29, 1984, Pan Am awarded vacancies in redistribution of pilot assignments based on the sale and withdrawal of the DC-10s. This award was similar to the award of March 28, 1983 in its discriminatory impact upon and treatment of Pan Am pilots over age 40.

14. To the best of my knowledge, before Pan Am issued assignments on March 28, 1983 and proceeded to re-train and re-position its pilots pursuant to those assignments, no Pan Am pilot over age 40 suffered demotion, furlough nor actual financial loss relative to under-40 airmen as a result of the operation of Pan Am's integrated pilot seniority system. After March 28, 1983, and continuing with the assignments issued on February 28, 1984, Pan Am pilots over age 40 were given and continue to hold assignments inferior to those given younger, under-40 pilots formerly employed by National.

15. Pan Am pilots are put into groups called "base station categories" for purposes of determining working conditions such as the following: monthly lines of flying; blank lines of flying (a schedule of days on and off);

vacations; open time board (additional flying time); and temporary assignments. The composition of, and treatment of pilots under, each "base station category" is derived entirely from the composition of, and treatment of each pilot under, the main pilot seniority list (referred to as the "system" seniority list). No Pan Am pilot over the age of 40 was disadvantaged in his assignment relative to under-40 pilots under the "system" seniority list until the issuance and implementation of the assignments of March 28, 1983. Thus, to the best of my knowledge, there was also no monetary or other actual damage suffered by Pan Am pilots over the age of 40 as a result of the operation of the "base station categories" in favor of under-40 pilots until the issuance and implementation of the assignments of March 28, 1983. Since that date, Pan Am pilots over age 40 have suffered monetary and other actual damage as a result of the operation of the "base station categories."

16. Because of the foregoing, until March 28, 1984 no Pan Am pilot over age 40 suffered demotion, furlough, monetary damage or other actual damage, relative to pilots under age 40, pursuant to the Pan Am pilot "system" seniority list or "base station categories."

17. The terms of the Gill award have not been adhered to nor carried out "mechanically" by Pan Am in its implementation of the pilot seniority system. The Gill award was complex, and ambiguous in many significant respects. The Gill award gave Pan Am considerable leeway to interpret its terms to Pan Am's best advantage. The ambiguity of the Gill award, and the discretion that it consequently affords Pan Am in the implementation of the pilot seniority system, is demonstrated by the following.

18. Exhibit A, attached hereto, consists of the Gill award, as issued March 12, 1981. By its own terms, the award foresees disputes "relating to the application, im-

plementation, or interpretation of this Award"; Section III sets forth procedures for resolving such disputes.

> Any (such) dispute shall be initially presented to a standing committee composed of two (2) NAL Pilot, two (2) PAA Pilot, two (2) NAL Flight Engineer, and two (2) FAA Flight Engineer Merger Representatives, to be appointed by their respective Master Executive Councils (or appropriate FEIA bodies) immediately following the issuance of this Award. In the event that the dispute cannot be resolved by the Committee by majority vote and reduced to writing and signed, it shall be submitted for resolution to a neutral arbitrator. . .

As stated in § 2 of this Affidavit, I am a Pre-Merger Pan American Pilot Representative on the Gill Award Disputes Resolution Committee. Four major disputes have recently been submitted to the Gill Award Disputes Resolution Committee; two of these have had to be referred to a neutral arbitrator.

19. Exhibit B, attached hereto, consists of a letter from Charles A. Burkhardt, Chairman, New York Local, Flight Engineers International Association, PAA Chapter ("FEIA-PAA"), dated December 28, 1981. This letter contains the following:

> It has been some time now that Mr. Gill made his grand decision on the issue of seniority and now we have to try to unravel his words as to their meaning or intent. I would like to pass along to you some of the various views that have *been* put forth as to what he resolved. *Please do not hold me, the local, or the chapter as officially standing for any of these thoughts*, but merely as information on the problem. (Emphasis added.)

20. Exhibit C, attached hereto, consists of minutes of the January 11, 1983 meeting of ALPA-PAA Council

#6. Such minutes contain the following statement by J.B. MacQuarrie, Chairman of ALPA-PAA:

> The bids on the board for 727 in New York look like they will be awarded to the orange division (National pilots). *It seems hard to believe, but it looks like that's the way it will be done.* Now, on the DC-10 bids for New York, due to the reduction of fleet size on the 747 and L-1011 aircraft, the blue division (Pan Am pilots) should be entitled to all the vacancies posted. . . *It remains to be seen how the company will award these vacancies.* (Emphasis added.)

21. Exhibit D, attached hereto, consists of minutes of the January 20, 1983 meeting of the New York Local, FEIA-PAA. Such minutes contain the following statement by Charles A. Burkhardt, Chairman:

> *First, I'm not pleased or even think the Gill Award resolved the seniority list integration problem. I think it created more problems than it attempted to resolve.* Second, the Gill Committee was formed as part of the Gill award to resolve and interpret the terms thereof and further if unable to agree to select an arbitrator for a binding decision. In reading the Gill award the parties have much disagreement as to its terms, but have "elected" not to resolve any differences until an actual situation exists and someone claims injury or their "rights" have been denied. If this position by the Gill Committee persists, . . . *the Company will make an interpretation that may very well be in their interest and not the airmen involved.* (Emphasis added.)

22. Exhibit E consists of a newsletter to all Pan Am Flight Engineers from Paul Chorbajian, President of FEIA-PAA, dated April 8, 1983. The letter contains the following statement.

> The number of DC-10 Captain, First Officer and Flight Engineer vacancies awarded to former Na-

> tional and Pan Am airmen as a result of the DC-747 and L-1011 fleet reductions *is the Company's interpretation of how Mr. Gill intended that vacancies should be filled in this situation. Neither the former National pilots or engineers nor the Pan Am pilots or engineers agreed that the Company's interpretation is proper,* but cannot agree among themselves as to the number of vacancies available to either Pan Am or the former National airmen. Consequently, an expedited arbitration is being held with Mr. George Nicolau as the arbitrator. (Emphasis added.)

23. Exhibit F, attached hereto, consists of a proffer issued by Pan Am on February 25, 1983 and transmitted to all Pan Am Pilots and Flight Engineers. The proffer contains the following language:

> *In light of the uncertainties of the Gill award* it is suggested that if desire you submit a bid for any position you may wish to occupy in the order of your choice. (Emphasis added.)

The same statement has been included in each of the proffers issued by Pan Am since its adoption of the current pilot seniority system.

/s/ Harold M. Gay, Jr.

SUBSCRIBED AND SWORN TO BEFORE ME by the said Harold Gay on this the 9 day of May, 1984, to certify my hand and seal of office.

/s/ Therese E. Brody
Notary Public in and for the
State of Pennsylvania

AFFIDAVIT

THE STATE OF FLORIDA)
)
COUNTY OF _____)

BEFORE ME, the undersigned authority, on this day personally appeared Robert L. Jarboe, who under oath did state the following:

1. My name is Robert L. Jarboe. I am above the age of twenty-one years and fully competent to make this affidavit.

2. Until my furlough on June 15, 1983, I was employed by Pan American Airways, Inc. ("Pan Am") as a Pilot/Flight Engineer. I was hired by Pan Am on June 5, 1967.

3. I am presently 43 years of age. I was born July 30, 1940. I have read Plaintiffs' Complaint dated March 7, 1984 and am familiar with the contentions contained therein.

4. As of June 26, 1981, the approximate date upon which Pan Am accepted the integrated pilot seniority list as constructed under the Gill award, I was employed by Pan Am as a Flight Engineer on the Boeing-727 ("B-727") aircraft. I retained this position through 1981 and 1982, until June 15, 1983.

5. By letter dated March 11, 1983, Pan Am informed me that I would be furloughed, *i.e.*, laid off, from Pan Am effective as of May 31, 1983. My furlough was subsequently postponed until June 15, 1983, when it became official. See Exhibit A, attached hereto. On information and belief, the furlough of June 15, 1983 had the following effect: three Pan Am pilots (Clifford Cool, Richard Paul, and I), all of whom were over age 40 and had over 16 years of credited experience as of the date of furlough, lost their jobs pursuant to the terms of the pilot seniority system. Over one hundred (100) former National pilots

under age 40 and with less credited experience than I or Messrs. Cool and Paul remained employed by Pan Am.

6. Before June 15, 1983, I suffered neither furlough, demotion, nor actual damage as a result of the operation of the integrated Pan Am seniority system. Since June 15, 1983, I have remained on furlough.

/s/ ROBERT L. JARBOE

SUBSCRIBED AND SWORN TO BEFORE ME bY the said Robert L. Jarboe on this the 10 day of May, 1984, to certify my hand and seal of office.

/s/ LAHO F. BURGESS
Notary Public in and for the
State of Florida

EXHIBIT A

Pan American World Airways
John F. Kennedy International Airport
Jamaica, New York 11430

March 29, 1983

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Dear Mr. Jarboe:

Please be advised that your furlough which was set for the close of business May 31, 1983 has been rescinded.

In accordance with the provisions for Section 4 of the Pilot Agreement or, if aplicable, Article 8 of the Flight Engineer Agreement, you are hereby informed that your furlough will now be effective close of business June 16, 1983.

Sincerely,

/s/ D. E. Pritchett
D. E. PRITCHETT
Vice President-Flight Operations

AFFIDAVIT OF MR. CHARLES E. EAGER

THE STATE OF NEW YORK)
)
COUNTY OF MADISON)

BEFORE ME, the undersigned authority, on this day personally appeared Charles E. Eager, who under oath did state the following:

1. My name is Charles E. Eager. I am above the age of twenty-one years and fully competent to make this affidavit.

2. I have been employed by Pan American World Airways, Inc. ("Pan Am") as a Pilot since May 31, 1966. I am a member of the Air Line Pilots Association ("ALPA").

3. I am presently 52 years of age. I was born November 19, 1931. I have read Plaintiffs' Complaint dated March 7, 1984 and am familiar with the contentions contained therein.

4. As of June 26, 1981, the approximate date upon which Pan Am accepted the integrated pilot seniority list as constructed under the Gill award, I was serving as first Officer on the Lockhead-1011) aircraft. I retained this position through 1981 and 1982, until April 25, 1983. On information and belief, all Pan Am airmen over age 40 similarly retained, until no earlier than March 28, 1983, the positions which they held before Pan Am's acceptance of the Gill award.

5. On or about March 28, 1983, vacancies were awarded by Pan Am under the pilot seniority system pursuant to the proffer issued between February 26 and March 17, 1983. On or about that date, I received notice that I was to be demoted from the position of

First Officer on the L-1011 to the position of First Officer on the Boeing-727 ("B-727"). The L-1011 is a wide-bodied aircraft; the pay for piloting such aircraft is higher than that for piloting the narrow bodied B-727. On or about April 25, 1983, I entered training in preparation for assuming my new position as B-727 First Officer.

6. As of about April 25, 1983, I was no longer salaried as an L-1011 First Officer, but as a B-727 First Officer. On or about June 1, 1983, I flew my first assignment as a B-727 First Officer.

7. On information and belief, the award of March 28, 1983 had the following impact or Pan Am pilots over the age of 40 positioned similarly to myself. Approximately sixteen (16) former National pilots under age 40 were given First Officer positions on wide-bodied aircraft, and approximately six (6) were given Captain positions, superior to those of several hundred Pan Am pilots over age 40, including myself, with greater credited experience. In hundreds of other instances, Pan Am pilots over age 40 received (and continue to receive) assignments inferior to those of former National pilots who are younger and have less credited experience than their Pan Am counterparts.

8. On or about February 29, 1984, Pan Am awarded vacancies in redistribution of pilot assignments based on its sale and withdrawal from service of sixteen (16) DC-10s. This award was similar to the award of March 28, 1983 in its discriminatory impact upon and treatment of Pan Am pilots over age 40. As a result of the award of February 29, 1984, I continued to be positioned as a B-727 First Officer, while former National pilots under age 40 were given Captain and First Officer assignments on wide-bodied aircraft.

9. I presently still hold the position of B-727 First Officer.

10. Before about April 25, 1983, I suffered neither demotion, decrease in salary nor actual damage as a result of the operation of the integrated Pan Am pilot seniority system. As of about April 25, 1983, and continuing to the present, I have suffered a decrease in gross annual salary of approximately $12,000 per year.

/s/ Charles E. Eager

SUBSCRIBED AND SWORN TO BEFORE ME by the said Charles E. Eager on this the 10 day of May, 1984, to certify my hand and seal of office.

/s/ KATHRYN L. NASH
Notary Public in and for the
State of New York